Supreme Court, U.S.
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In The

Supreme Court of the United States

SANFORD P. BRASS,

Petitioner,

versus

GDQ CORPORATION, AN ARKANSAS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GEOFFREY C. HAZARD, JR.
513 Cedar Lane
Swarthmore, Pennsylvania 19081

MICHAEL H. RUBIN
Counsel of Record
McGLINCHEY STAFFORD
A Professional Limited Liability Company
9th Floor, One American Place
Baton Rouge, Louisiana 70825
Phone: 225-383-9000
Fax: 225-343-3076

JOEL W. MOHRMAN
McGLINCHEY STAFFORD
A Professional Limited Liability Company
1001 McKinney, Suite 1500
Houston, Texas 77002
Phone: 713-520-1900
Fax: 713-520-1025

Attorneys for Petitioner Sanford P. Brass

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether 28 U.S.C. §1359's prohibition on improper joinder may be evaded by a partial assignment of a note when the defendant maker of the note and the partial assignor are not diverse and the suit is brought only by the partial assignee?

LIST OF PARTIES

The parties in the courts below are:

Plaintiff – Appellee: GDQ Corporation, an Arkansas corporation. Its sole shareholder and its President is John Ed Chambers, III, an Arkansas citizen.

Defendant – Appellant: Sanford P. Brass, a Texas citizen.

Jerral W. Jones, a Texas citizen who is not a party to this litigation, but who is an interested person aligned with the Plaintiff – Appellee, GDQ. Jones is (i) the holder of the note upon which GDQ brought suit, (ii) the owner of an undivided 50% interest in the recourse portion of the note, and (iii) the owner of 100% of the non-recourse portion of the note.

Sanford P. Brass is the petitioner in this Court. GDQ is the respondent.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioner Sanford P. Brass respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 11, 2000.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the panel of the United States Court of Appeals for the Fifth Circuit entered on August 11, 2000, is reprinted in the Appendix at pages App. 1 through App. 2. The Fifth Circuit's September 15, 2000 denial of the request for Rehearing En Banc is reprinted at Appendix pages App. 86 through App. 87. The Memorandum and Order of the United States District Court for the Southern District of Texas, dated October 31, 1998, is reprinted in the Appendix at pages App. 3 through App. 40. The Memorandum and Order of the United States District Court for the Southern District of Texas, dated December 23, 1998 (vacating its October 31, 1998 order), is reprinted in the Appendix at App. 41 through App. 46. The Memorandum and Order of the United States District Court for the Southern District of Texas, dated August 31, 1999, is reprinted in the Appendix at pages App. 47 through App. 83. The Further Amended Superseding Final Judgment of the United States District Court for the Southern District of Texas,

dated November 16, 1999, is reprinted in the Appendix at pages App. 84 through App. 85.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on August 11, 2000 affirming the judgment of the United States District Court for the Southern District of Texas. A timely petition for Rehearing En Banc was denied on September 15, 2000. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Title 28 U.S.C. §1359:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

Introduction

In this case, a Texas citizen has been sued in federal court after a partial assignment of a note was made for no monetary consideration less than thirty days before suit by the assignee, an Arkansas shell corporation. The assignor is the original note holder, a Texas citizen who continues to own and hold a substantial interest in the note.

But for the assignment, the federal court would have no jurisdiction.

I. Statement of Facts

The key parties in this case are: Jerral W. "Jerry" Jones, a Texas citizen; Sanford P. Brass, a Texas citizen; and GDQ Corporation, an Arkansas entity owned and controlled solely by John Ed Chambers, an Arkansas citizen who is Jerry Jones's brother-in-law, and his business associate and partner in other transactions (TR. 25-28, 90-92).

Jerry Jones and Sanford Brass were involved in several business investments that were dissolved in a complicated settlement. As part of the settlement, Brass executed the June 6, 1986 Note at issue in this litigation.[1]

Brass paid more than $5.5 million on the Note, but ceased payment because of Jones's failure to comply with his obligations under the settlement agreement (R. 424).

Nine years later, and thirty days prior to the filing of this suit, Jones assigned a portion of the Note[2] to GDQ, an Arkansas corporation controlled by his brother-in-law, Chambers (R. 624, 639-641). On the same day, in a letter agreement Jones and GDQ agreed that GDQ would sue

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[1] A copy of the $6,850,000 note is found at R. 639-40. Portions of this Note were recourse, with personal liability of the maker, and portions were non-recourse, without any personal liability of the maker.

[2] Jones assigned only the recourse portion of the Note; he did not assign the non-recourse portion.

on the Note[3] and remit 50% of the proceeds to Jones after the costs of collection (R. 476).[4]

GDQ had no day-to-day activities (TR. 89) and had never purchased a claim or note before (TR. 90). Jones's brother-in-law signed the "assignment" on behalf of GDQ without (by his own admission) having read it (TR. 109). Although Chambers, the brother-in-law, admitted he had not reviewed the Note at the time of the assignment, Chambers knew that there were problems with it (TR. 110-112), and admitted that he didn't know and didn't care whether there was collateral for the Note (TR. 113).[5]

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[3] GDQ's collection efforts were limited to the recourse portion; the non-recourse portion of Note A was never assigned by Jones.

[4] The "assignment" was drafted by two attorneys, one of whom had represented Jones for over twenty-five years (TR. 38, 135-138), and the other of whom took his instructions from Jones in connection with the drafting of the "assignment," although he represented GDQ (TR. 135-136). One of GDQ's attorney's bills (EX. 26) was addressed to Jones's son at Jones's business address; GDQ's attorney testified that he had no explanation for the sending of these bills to Jones and his son instead of GDQ (TR. 148, 149).

[5] "Q. Right, and you didn't know whether or not there was any collateral that would secure the note?

"A. Didn't make me any difference.

"Q. But you didn't know?

"A. I don't think I did." (TR. 113).

GDQ paid nothing for the assignment (TR. 109). Chambers could not even recall paying the nominal $10 stated consideration (TR. 109).[6]

Jones had "input" into the litigation (TR. 149) and decisions about this case (EX. 45, p. 74). The lawsuit could not be settled for less than a full payoff without Jones's prior approval (TR. 129).

Thirty days after the assignment, GDQ filed suit in the United States District Court for the Southern District of Texas alleging diversity of citizenship. At the time of the filing of suit, both Brass and Jones were Texas citizens.

The trial court found, after an evidentiary hearing, that Jones and GDQ did not create the partial assignment in order to invoke diversity jurisdiction.

II. Course of proceedings and disposition in the court below

GDQ, an Arkansas corporation, filed suit against Sanford Brass, a Texas citizen, in June, 1997 only on a portion of the Note (R. 8). Jones, a Texas citizen, was not a named plaintiff, even though he retained an interest in the Note. Brass objected to the court's jurisdiction based on lack of diversity and filed an answer and defenses (R. 15).

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[6] The note was never endorsed to GDQ (TR. 36). GDQ is not a holder or holder in due course of the non-negotiable note (R. 1232).

Brass and GDQ filed opposing motions for summary judgment. In October, 1998 (App. 39), the district court granted GDQ partial summary judgment, dismissed the remainder of GDQ's claims without prejudice, and denied all of Brass's summary judgment motion except that portion which limited GDQ's rights on the extent of collateral available for foreclosure; the Court then issued a final judgment. Brass timely sought reconsideration of this ruling.

In December 1998 (App. 41), the district court granted Brass's motion for reconsideration of whether the federal court had jurisdiction in the case, vacated its final judgment, and set the case for hearing.

Following briefing and an evidentiary hearing, the district court entered an August 31, 1999 memorandum (App. 47) and order reinstating the prior judgment (R. 1534). Final judgment was entered in favor of GDQ against Brass (App. 85).

Brass filed a timely notice of appeal. The Fifth Circuit, in a per curiam decision dated August 11, 2000 (App. 1), affirmed the order of the district court. The Fifth Circuit denied Brass's request for a rehearing *en banc* (App. 86).

REASONS FOR GRANTING THE PETITION

This case involves the proper construction of 28 U.S.C. §1359 as it applies to partial assignments, the type of situation this Court encountered in *Kramer v. Caribbean*

Mills, Inc., 394 U.S. 823, 827 (1969). *Kramer* held that such an assignment was insufficient, under §1359, to create diversity jurisdiction. There is a conflict in the circuit courts of appeal about the appropriate standard to be used in interpreting the statute. The Fifth Circuit, in this case, held that the assignor's motive is the sole and controlling factor. In contrast, the Ninth Circuit has held that "[t]he objective fact of who really is the party in interest is the most important thing to be determined." *Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 596 (9th Cir. 1996).

The Fifth Circuit's ruling is contrary to the language and purpose of 28 U.S.C. §1359[7] and undermines this Court's ruling in *Kramer*. If, as the Fifth Circuit held, the "motive" for a partial assignment is determinative, then any partial assignment could be sufficient to invoke diversity jurisdiction. The motive accepted below was that the assignor did not want the "front-line responsibility of collection efforts" (App. 26), did not want to spend his personal time on the litigation (App. 56), and did not want the publicity arising from the litigation (App. 57). This motive could justify finding jurisdiction in all partial assignments. This is surely inconsistent with the text and purpose of §1359.

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[7] The Fifth Circuit's ruling also is inconsistent with its prior holding in *Grassi v. Ciba-Geigy, Ltd.*, 849 F.2d 181 (5th Cir. 1990), a case involving a partial assignment intended to destroy rather than create diversity jurisdiction. The Fifth Circuit applied §1359 and the *Kramer* analysis to the situation and held that diversity jurisdiction was determined with reference to the citizenship of the assignor/plaintiff and the obligor/defendant.

If the decision is allowed to stand, the floodgates against the creation of diversity jurisdiction through partial assignments by non-diverse assignors, which this Court erected in *Kramer*, will be opened. Any and all such assignments will be sufficient to create diversity jurisdiction as long as the trial court concludes that the assignor had no subjective intent to invoke federal court jurisdiction in a case filed by the diverse assignee. This "empty head – pure heart approach"[8] reads the word "improper" out of §1359's phrase "improper *or* collusive" (emphasis supplied). The Fifth Circuit's holding is the antithesis of the Ninth Circuit's ruling in *Attorneys Trust* that "there is no reason to give motive controlling weight." 93 F.3d at 596.

I. THE RULING BELOW IS CONTRARY TO THIS COURT'S INTERPRETATION OF 28 U.S.C. §1359 IN *KRAMER*

In *Kramer*, a claim was assigned for collection. 95% of the claim was immediately reassigned back to the assignor. Without the assignment, the *Kramer* suit could not have been brought in federal court, because (as in the instant case) there was no diversity of citizenship between the assignor and obligor. This Court had no difficulty in rejecting jurisdiction. Although not expressly stated in these terms, the Court's opinion makes it clear that its finding was based on the fact that the assignment was both "improper" and "collusive" under §1359. It was "improper" because of a variety of objective factors: there

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[8] *Attorneys Trust*, 93 F.3d at 599.

was no diversity apart from the assignment; the assignor retained a substantial interest in the underlying obligation (394 U.S. at 827); and the assignment was merely a collection contract with the assignee's only risk being the cost of collection (*id.*). The assignment also was "collusive" because of Kramer's candid admission that the "assignment was in substantial part motivated by a desire" to invoke diversity jurisdiction (*id.*); however, the motivation of Kramer was an *additional* (not the controlling) reason why §1359 had been violated and was mentioned at the end of this Court's analysis of the objective factors that demonstrated the impropriety of allowing a partial assignment to create diversity jurisdiction.

Kramer found *Farmington Village Corp. v. Pillsbury*, 114 U.S. 138 (1885), to be "[t]he most compelling precedent." 394 U.S. at 827. In *Farmington*, as here, there was an assignment and simultaneous reassignment, but in *Farmington* no diversity jurisdiction was found to be present. In *Farmington*, a citizen of Maine transferred bond coupons to a Massachusetts citizen and was immediately reassigned a 50% interest in these coupons; "apart from the hoped-for creation of federal jurisdiction the only real consequence of the transfer was to enable the Massachusetts plaintiff to 'retain one-half of what he collects for the use of his name and his trouble in collecting.' "[9] *Farmington* distinguished an assignment/reassignment situation from one that "actually conveys *all* the interest of the assignor in the thing assigned"[10] and cautioned against allowing an "assignee to sue in the courts of the

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[9] *Kramer*, 394 U.S. at 827, citing *Farmington*, 114 U.S. at 146.

[10] *Farmington*, 114 U.S. at 144 (emphasis supplied).

United States for the benefit of the assignor when the assignor himself could not bring the action."[11]

In the instant case, the factors of both *Farmington* and *Kramer* are met:

- As in *Farmington*, Jones, the assignor below, retained a 50% interest in the underlying obligation being assigned (the recourse portion). In addition, Jones retains a 100% interest in the remainder of the note (the non-recourse portion).

- As in both *Farmington* and *Kramer*, the assignment below is a collection contract (TR. 29, 108), and the assignee here, as in *Kramer*, had a "total lack of previous connection with the matter." 394 U.S. at 827.

- In *Kramer*, the assignee "would have been out only $1, plus costs"[12] if the suit had been unsuccessful. Here, GDQ will be out only $10 plus costs if the suit is unsuccessful (EX. 5).

- As in *Kramer*, the purported assignment was accompanied by a "simultaneous reassignment" (*id.*) of a substantial interest back to the assignor.

Despite the fact that the *Farmington* and *Kramer* factors were present, the Fifth Circuit held that the assignment/reassignment was a sufficient basis for diversity jurisdiction because of the district court's finding that Jones did not have a subjective intent to invoke federal court jurisdiction.

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[11] *Id.*

[12] 394 U.S. at 828.

II. THE MOTIVE/FUNCTION TEST HAS NO APPLICABILITY TO PARTIAL ASSIGNMENTS AND HAS BEEN LEGISLATIVELY OVERRULED IN THE AMENDMENTS TO 28 U.S.C. §1332

The Fifth Circuit adopted the district court's view of §1359, which rejected the Ninth Circuit's *Attorneys Trust* objective analysis in favor of the "motive/function" test of *Bianca v. Parke-Davis Pharmaceutical Div. of Warner Lambert, Co.*, 723 F.2d 392, 397 (5th Cir. 1984), a case involving not an assignment/reassignment but rather the appointment of an administratrix.

The origins of *Bianca's* motive/function test arose from *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968),[13] a case cited in *Kramer* (394 U.S. at 828 n.9) when this Court noted it was not being required to address a suit brought by an administrator or guardian.

Bianca involved the death of a Mississippi child; the defendants were all Mississippi citizens. A Mississippi court appointed a Louisiana administratrix for the estate of the minor child, and suit was brought in federal court. In conducting the diversity jurisdiction inquiry, *Bianca* relied upon *McSparran's* formulation of what the Fifth Circuit termed the "motive/function rule." 723 F.2d at 395.

Although both *McSparran* and *Bianca* involved solely state court-appointed representatives and not assignments/reassignments, both the district court and Fifth Circuit below found *Bianca's* "motive/function" test to be determinative. Yet, four years after *Bianca* was decided,

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[13] *En banc* decision, *cert. denied*, 395 U.S. 903 (1969).

Congress added 28 U.S.C. §1332(c)(2) and eliminated the need to ever examine the "motive/function" of such appointments. Under §1332(c)(2), one looks only to the citizenship of the decedent or minor or incompetent, regardless of the citizenship of the executor or administrator or guardian. Thus, the inquiry that *McSparran* and *Bianca* conducted is no longer necessary; regardless of the motive or function behind the appointment of the representative, it is the citizenship of the person whose rights are being vindicated – the decedent, minor, or incompetent – that is determinative.[14]

Kramer noted that there were significant differences between contractual assignments and state-appointed guardians.[15] The motives found sufficient below are ones that can apply to every partial assignment: the assignor did not want to devote the time to the litigation and did not want to be a named party because of the publicity, but did want to receive substantial benefits from the

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[14] For an extensive discussion of the change in §1332(c)(2) involving estates and minors, see David D. Siegel, "Commentary on the 1988 Revision," 28 U.S.C.A. §1332, Ch. 85 at 9-10 (West Publishing Company 1993).

[15] "Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties. It is not necessary to decide whether these distinctions amount to a difference for purposes of §1359." 394 U.S. at 828 n. 9.

litigation. If this "motive" is all that is needed, then there will be an irresistible incentive to structure every contract and tort claim as an assignment/reassignment. This demonstrates the fallacy of applying the "motive/function" test to partial assignments.

III. THE 1948 AMENDMENTS TO 28 U.S.C. §1359 LIMIT DIVERSITY JURISDICTION

The purpose of the 1948 enactment of 28 U.S.C. §1359, as this Court explained in *Kramer*, was to change the assignee clause (394 U.S. at 827) and to "prevent the manufacture of diversity jurisdiction by the device of assignment."[16] Joinder that resulted from assignments that were either improper or collusive was prohibited. The original assignee clause did not accomplish this task because there was an exemption for foreign bills of exchange and corporate bearer paper.[17] Congress continued to limit diversity jurisdiction through the 1988 addition of U.S.C. §1332(c)(2),[18] which legislatively quashed the *Bianca* motive/function inquiry into the state court appointment of guardians and administrators.

The purpose of limiting diversity jurisdiction will be vitiated if, in the case of partial assignments, the sole test becomes the subjective motive of the assignor. In the case of partial assignments, the right being vindicated belongs

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[16] *Kramer*, 394 U.S. at 827, quoting *Revision Notes and Legislative Reports 1948 Acts.*

[17] 28 U.S.C. §1359 *Revision Notes and Legislative Reports 1948 Acts.*

[18] Pub. L. 100-702, Title II, §202(b).

to both the assignor and the assignee. The partial assignee is suing in his own name for the benefit of both himself and the partial assignor; any collection inures to the benefit of both of them. The Fifth Circuit emasculates §1359 when it looks solely to motive, concentrating on the term "collusive" in §1359 and giving no weight or meaning to the word "improper."

The Ninth Circuit has clearly held in *Attorneys Trust* that lower courts should not be allowed to avoid the critical diversity jurisdiction inquiry by retreating into merely parsing the subjective intent of the partial assignor, even if the only plaintiff is the partial assignee. When there has been a partial assignment, the assignor has a right that is being handled by another, a right that is being prosecuted in federal court, and a real interest in the outcome of the litigation. While, in some partial assignments, the assignor may admit to having a motive of invoking federal jurisdiction, it is submitted that regardless of the professed subjective motive of the assignor, a partial assignment of an obligation should never be sufficient for invocation of federal jurisdiction when there is not complete diversity between the partial assignor and the defendant.

The holding of *Kramer* is recognition that the §1359 diversity jurisdiction inquiry is not superfluous merely because the assignment may be valid under state law[19] or because a partial assignee may be a "real party in interest" for the purposes of instituting suit under

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[19] See *Kramer*, 394 U.S. at 829.

F.R.C.P. 17.[20] For example, a court-appointed representative for an infant is a real party in interest for the purposes of filing suit under F.R.C.P. 17(c),[21] but, as has been noted, for purposes of diversity jurisdiction, it is the citizenship of the infant and not the representative that is determinative under §1332(c)(2).[22]

Just as this Court has interpreted 28 U.S.C. §1332(a) to mandate an examination of the citizenship of all partners in a limited partnership, not just the citizenship of the general partner,[23] it should interpret §1359 to mandate an examination of the citizenship of both the partial

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[20] At common law, an assignee could not bring suit because he did not have legal title to the action. 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1545 (2d ed. 1990). The real party in interest concept developed as a method of eliminating this rule. *Id.* Its analysis focuses on what has been assigned and whether the assignment is valid, factors not controlling in a §1359 analysis.

[21] F.R.C.P. 17(c) provides: "Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

[22] 28 U.S.C. §1332(c)(2) provides: "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent."

[23] *Carden v. Arkoma Associates*, 494 U.S. 185 (1990).

assignor and partial assignee. No rights are imperiled, for those cases can and should be brought in state courts.

As the Fifth Circuit stated in *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990), a case briefed to the circuit court below but not mentioned in its opinion, diversity jurisdiction would be an illusion if it could be altered "by the simple expedient of assigning a fractional interest in the outcome of the suit to an agent."

IV. THE QUESTION PRESENTED IS IMPORTANT

Just as in *Kramer*, there is no need here to address the situation of a complete, 100% assignment of an obligation.[24] When there has been a partial assignment, however, the harm to the federal system of limited jurisdiction is real and immediate. If a 50% partial assignment is sufficient to create diversity jurisdiction and not run afoul of §1359 solely because of the testimony of subjective intent by the non-diverse partial assignor, then

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[24] "Hence, we have no occasion to re-examine the cases in which this Court has held that where the transfer of a claim is absolute, with the transferor retaining no interest in the subject matter, then the transfer is not 'improperly or collusively made,' regardless of the transferor's motive." *Kramer*, 394 U.S. at 828 n. 9.

Compare, Herzog Contracting Corp. v. McGowen Corp., 976 F.2d 1062 (7th Cir. 1992), finding that an assignment of promissory notes from a non-diverse subsidiary corporation to its diverse parent corporation was not improper or collusive; *with Airlines Reporting Corp. v. S and N Travel, Inc.*, 58 F.3d 857 (2d Cir. 1995), applying a presumption of collusion when the transaction is between a parent corporation and its subsidiaries or is between corporate directors and shareholders.

this Court's opinion in *Farmington* (a 50% partial assignment) would be a hollow shell rather than the "most compelling precedent." *Kramer*, 394 U.S. at 827. If a 50% partial assignment is enough, then a 40%, then a 30%, and then even a 5% partial assignment would be acceptable, eviscerating this Court's ruling in *Kramer* (which involved a 5% assignment). Next will come 1% and .0005% partial assignments.

If the ruling below is allowed to stand, then this Court's prescient warning in *Kramer* will come to pass, for if "federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such 'manufacture of Federal jurisdiction' was the very thing which Congress intended to prevent when it enacted §1359 and its predecessors." 394 U.S. at 828-29.

It is submitted that the way to effectuate the meaning and purpose of §1359 is to overturn the Fifth Circuit's ruling and to read the statute as meaning that every *partial assignee* has been "improperly . . . made or joined" as a party plaintiff unless the *partial assignor* also has complete diversity from the defendant. This interpretation will prevent the federal courts from being inundated with diversity cases founded on tort and contract partial assignments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEOFFREY C. HAZARD, JR.
513 Cedar Lane
Swarthmore, Pennsylvania 19081

MICHAEL H. RUBIN
Counsel of Record
McGLINCHEY STAFFORD
A Professional Limited Liability Company
9th Floor, One American Place
Baton Rouge, Louisiana 70825
Phone: 225-383-9000
Fax: 225-343-3076

JOEL W. MOHRMAN
McGLINCHEY STAFFORD
A Professional Limited Liability Company
1001 McKinney, Suite 1500
Houston, Texas 77002
Phone: 713-520-1900
Fax: 713-520-1025

Attorneys for Petitioner
Sanford P. Brass

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20953

GDQ CORPORATION, An Arkansas Corporation

Plaintiff-Appellee

v.

SANFORD P. BRASS, An Individual

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-97-CV-1936

(Filed Aug. 11, 2000)

Before KING, Chief Judge, and REYNALDO G. GARZA and PARKER, Circuit Judges.

PER CURIAM:*

Citing *Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co.*, 723 F.3d [sic] 392, 397 (5th Cir. 1984), the district court correctly held that the inquiry under 28 U.S.C. § 1359 is guided by the "motive/function" rule,

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and the effort of defendant-appellant Sanford P. Brass to persuade us that a different rule does or should obtain for assignments fails for the reasons adduced by plaintiff-appellee GDQ Corporation in its appellate brief. The findings of fact of the district court on the question whether the assignment at issue here was improperly or collusively made to invoke federal jurisdiction are not clearly erroneous. The district court also correctly held that the assignment was valid under Oklahoma law. Brass's contention that the assignment was champertous, which was made to the district court for the first time in his motion for reconsideration was waived. Even if it had not been waived, the district court did not abuse its discretion in denying Brass's motion for reconsideration on this ground as GDQ had a sufficient interest in the action and no officious intermeddling was established. Finally, having argued that Oklahoma law controlled on the statute of limitations issue during the briefing on the summary judgment motion, Brass was in no position to change horses on his motion for reconsideration.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GDQ CORPORATION,	§	CIVIL ACTION NO.
Plaintiff,	§	H-97-1936
	§	
v.	§	
	§	
SANFORD P. BRASS,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 2, 1998)

Pending before the Court in this suit on a promissory note are Defendant Sanford P. Brass' Motion for Summary Judgment [Doc. # 32] ("Defendant's Motion")[1] and Plaintiff GDQ Corporation's Motion for Summary Judgment [Doc. # 36] ("Plaintiff's Motion").[2] The Court has considered these Motions, all related submissions, all other matters of record, as well as the applicable authorities, and concludes that Plaintiff's Motion [Doc. # 36] should be granted, Defendant's Motion [Doc. # 32] should be denied as to Defendant's claims of improper assignment,

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[1] Plaintiff has responded in opposition [Doc. # 39] ("Plaintiff's Response"), and Defendant has replied [Doc. # 42] ("Defendant's Reply").

[2] Defendant filed a Response (Doc. # 40] ("Defendant's Response"), Plaintiff has replied to this Response [Doc. # 44] ("Plaintiff's Reply"), and Defendant has filed a Sur-Reply Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [Doc. # 45] ("Defendant's Sur-Reply").

but Defendant's remaining contention limiting the collateral available for foreclosure on the note in issue should be granted. The Court further concludes that the Second Claim of Plaintiff's Complaint [Doc. # 1] should be dismissed without prejudice.

I. BACKGROUND

A. Factual Chronology

This dispute arises out of a promissory note signed by Defendant Sanford Brass ("Brass") on June 6, 1986. Brass, the maker of the note, ended a long-standing business relationship with the promisee of the note, Jerral W. Jones ("Jones"). The parties stated their intentions to terminate all their prior business dealings by entering into a complex settlement agreement on April 10, 1986 (the "April 1996 Agreement"). In connection with that settlement, they executed several promissory notes on June 6, 1986, one of which is at issue in this case ("Note A"). Jones, not a party to this suit, contends that Brass failed to pay the entire sum due under Note A. On May 6, 1997, Jones transferred Note A to Plaintiff GDQ Corporation ("GDQ") for collection.

Note A originally was issued pursuant to the April 1986 Agreement between Brass and Jones. Jones and Brass had been business partners in a variety of ventures. During the 1980's, the downturn in the oil and gas industry left both men with substantial financial liabilities. The most serious of the liabilities concerned a suit that the Federal Deposit Insurance Corporation ("FDIC") brought against both Jones and Brass. Jones settled the claim by

paying the FDIC $13.7 million. In turn, the FDIC assigned its interest in all of the outstanding notes to Jones. Due to conflicts concerning the apportionment of liabilities under the various FDIC notes, Jones and Brass decided to end their formal business relationship, thus entering into the April 1996 Agreement to divide their business interests. *See* Defendant's Response, Exhibit 1.[3] The parties' business "divorce," however, was not entirely resolved in 1986, and in 1987 they entered into another settlement dated May 28, 1997 ("May 1997 Settlement") that specified, among other matters, Brass' obligations to Jones in connection with the latter's payment to the FDIC. Note A, Note B, and Note C were referred to in the May 1997 Agreement, as were detailed descriptions of the collateral securing each of these notes.

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[3] The record indicates that there are four settlement agreements, three between Jones and Brass, and one other with an entity affiliated with Jones. The original settlement agreement, which is not in the record, was signed on April 10, 1986. This agreement was amended on May 28, 1987, and was denominated "Amended and Restated Settlement Agreement." *See* Defendant's Response, Exhibit 1. Brass seems to rely primarily on the May 28, 1987 agreement in his pleadings. There is, however, another settlement agreement, however, between Jones and Brass, dated January 14, 1987. *See* Defendant's Response, Exhibit 2. Finally, there is a fourth settlement agreement between Brass and Arkoma Exploration Company signed January 14, 1987. *See* Defendant's Response, Exhibit 3. Arkoma Exploration is an Arkansas Corporation owned by Jones. Further complicating matters, there are two escrow agreements between Jones and Brass. *See* Defendant's Response, Exhibits 5 and 6. Both of these escrow agreements specifically refer to earlier settlement agreements and provide for the proper payment of sums due under the various settlement agreements.

The parties agree that Note A is duly executed. In response to GDQ's Interrogatory No. 4, Brass admitted that he executed and authorized delivery of the Note to Jones. *See* Defendant's Sur-Reply, Exhibit A, at 5. Note A states that the maker, Brass, shall pay the promisee, Jones, $6,850,000.00.

Note A does not contain a maturity date, but includes an incorporation provision that states:

> This Secured Promissory Note A ("Note A") is made, executed and delivered pursuant to the terms of the Settlement Agreement, dated April 10, 1986, as amended, between Maker and Holder ("the Settlement Agreement"). All of the terms and conditions of the Settlement Agreement are incorporated herein by reference as if they were fully set forth herein.

The parties have not submitted a copy of the April 1986 Agreement. Rather, the parties repeatedly refer the Court to their May 1987 Settlement, which states that Note A will mature on June 6, 1992.

The debt reflected in Note A was secured "by the collateral described in the settlement agreement." Also, Note A contains a choice of law clause that provides that the note "is to be construed according to the laws of the State of Oklahoma." It also states that if the note is turned over to an attorney for collection, the maker "will pay to the Holder his reasonable attorney's fees and all court costs and other expenses."

Because Note A had matured in 1992 and had not been fully paid, on May 6, 1997, Jones assigned it to GDQ. *See* Plaintiff's Motion, Exhibit 5. Jones explains that he

assigned the note because collection had become too difficult and time consuming. In his deposition. Jones stated that, "I'm better served as far as my time is concerned being a witness than I am a Plaintiff." Deposition of Jerral Jones ("Jones Deposition"), Defendant's Motion, Exhibit 16, at 9. The Jones/GDQ assignment agreement states that Jones assigns Note A to GDQ. "In consideration of the sum of Ten Dollars ($10.00) in hand paid, and for other good and valuable consideration. . . . " *Id.* In a letter agreement, dated the same day as the Jones/GDQ assignment, the President of GDQ, John E. Chambers III, memorialized an agreement that GDQ would receive "50% of the proceeds of collection on said note actually received by GDQ." Letter from John Ed Chambers, III to Jerral W. Jones, dated May 6, 1997, Defendant's Motion, Exhibit 6. The letter was signed as "agreed and accepted" by Jones. In consideration for the assignment of fifty percent of Jones' interest, Chambers promised to "vigorously pursue enforcement of the promissory note obligation." *Id.*[4] Plaintiff GDQ, as an assignee of Note A, seeks by this suit to collect the amount due and owing on Note A. *See* Plaintiff's Motion, Exhibit 4.

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[4] Although not germane to the pending dispute, the letter agreement appears to be ambiguous as to who will bear the costs of collection: it states that GDQ will pay Jones "50% of the proceeds of collection, if any, *net* of all legal fees and related collection expenses incurred by GDQ in its efforts to secure payment of the amounts due and owing on the note." In the very next sentence, however, GDQ inconsistently agrees to bear all collection fees and expenses.

There is no dispute that an outstanding unpaid balance exists on Note A, but the parties vehemently disagree about the amount now due. A certified public accountant hired by GDQ (George E. Mitchell) calculated the unpaid balance on Note A to be $5,075,163.93 as of August 1, 1998. *See* Affidavit of George E. Mitchell, C.P.A., Plaintiff's Motion, Exhibit 7. When penalty interest was added, the C.P.A. concluded $5,227,001.57 was due on that note. Brass has submitted evidence from his own accountant, who argues that GDQ has failed to include a credit of $61,502.58, plus interest, as of August 28, 1986.[5]

Brass also disputes the sum claimed by GDQ because it fails to include "hundreds of thousands of dollars of payments" that Brass has made on Note A. *See* Defendant's Response, at 3. Most significantly, Brass further argues that, if the Court holds that he is liable under Note A, he is entitled to an offset of $1,500,000 plus interest. *See* Defendant's Reply, at 7. Brass bases this argument in part on a January 14, 1987 settlement agreement he entered into with Jones' company Arkoma Exploration Company ("Arkoma/Brass Compromise"), pursuant to which Arkoma assigned certain mineral interests to Brass. *See* Defendant's Reply, Exhibit 3 and 4.[6] Brass

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[5] Even though GDQ disputes the validity of this credit, C.P.A. Mitchell recalculated the amount due and concludes that Brass owes $5,053,245.80. *Id.*

[6] Brass claims that Jones failed to convey the entire mineral interest he promised when Jones agreed to settle Brass' claim against Jones' company, Arkoma. This claim arose from Arkoma's alleged failure to meet all its obligations on a $1.5 million investment by a Brass/Jones entity called Mutual

claims that Jones falsely promised a 1.6 to one return on this investment. *See* Second Declaration of Defendant Sanford P. Brass, Defendant's Reply, Exhibit 20, at 4.

Brass also contends that he is entitled to two other offsets arising from a $265,038.00 payment he made on January 14, 1987, for which he allegedly was not given credit in GDQ's accounting, and a payment of $29,864.00 allegedly due from Jones in connection with a credit for taxes paid by Brass on the collateral subject to the notes.

B. Summary of Pending Motions and Parties' Contentions

1. GDQ's Summary Judgment Motion

On July 31, 1998, GDQ filed a Motion for Summary Judgment seeking a summary disposition on one of the two legal claims in its Complaint [Doc. # 1. GDQ claims that it is the legal owner, as assignee, and the legal holder of Note A. GDQ requests by its Motion that the Court enforce the note's terms, which is fully matured and now years in default. GDQ also originally asked the Court to order foreclosure on the collateral securing Note A.

Petroleum Marketing Company ("Mutual"). In an agreement dated January 14, 1987, Jones agreed to convey certain mineral interests to Brass in consideration of Brass' release of the $1.5 million claim. *See* Defendant's Response, Exhibit 3. Brass claims he is entitled to an offset equal to the value of the promised mineral interests, plus interest from the date of the Arkoma/Brass Compromise.

However, in its Response to Brass' Motion, GDQ has withdrawn this claim.[7]

GDQ further argues that Brass is not entitled to a $1.5 million set-off because Brass' claims against Jones and Arkoma arose out of a different transaction from the April 1986 Agreement giving rise to Note A.[8] GDQ also contends that it has given Brass credit for all payments he made and obligations owed by Jones.

Brass has responded to GDQ's Motion by arguing that summary judgment is improper in this case for several reasons. First, Brass argues that the assignment of Note A was ineffective because Jones failed to provide him with thirty days' advance notice of the assignment and with GDQ's address. Second, Brass contends that Plaintiff's accountant, Mitchell, improperly calculated the amount due on Note A. According to Brass, Mitchell failed to include several payments that Brass has made on Note A. Finally, Brass contends that there are factual

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[7] GDQ also sought originally in its complaint that the Court order foreclosure of Brass' assets identified as collateral for Note A. GDQ has now withdrawn this request as premature (Plaintiff's Response, at 24), apparently in response to Brass' arguments that the terms of the Settlement Agreement limit GDQ's (and Jones') ability to foreclose.

[8] The parties appear to agree that recoupment is defined as:

> The right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract.

Bank of Oklahoma v. Briscoe, 911 P.2d 311, 318 (Okla. Ct. App. 1995) (quoting BLACK'S LAW DICTIONARY (4th ed. 1968)).

disputes concerning his set-off claim. Brass first argues that the set-off claim arises out of the same transaction as Note A, and therefore is a proper claim in recoupment against the assignee GDQ. Brass also contends that there are factual issues concerning Jones' obligations under the various Settlement Agreements.

2. Brass' Summary Judgment Motion

Brass moved for summary judgment asserting similar arguments to those asserted in defense of GDQ's summary judgment motion. First, Brass argues that GDQ lacks standing to enforce Note A because Jones allegedly failed to comply with the express terms of the Note when he assigned it to GDQ without giving thirty days' advance notice and without timely providing GDQ's address.[9] Second, Brass contends also that the assignment lacked consideration. Third, Brass contends that the assignment was merely a collusive attempt to create diversity jurisdiction. Fourth, Brass contends that even if GDQ may collect on Note A, Brass is entitled to various offsets. Finally, Brass contends, as to the count in GDQ's Complaint seeking foreclosure of collateral, the terms of the "Settlement Agreement" limit the collateral subject to foreclosure upon default of Note A.

GDQ argues in response that it does have standing to bring an action on Note A, because Jones' alleged violation of the thirty day and address notice provisions does

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[9] Both Note A and the May 28, 1987 Settlement agreement contain the same assignment notice provision. *See* Defendant's Response, Exhibits 1 and 7.

not affect GDQ's right to enforce the note and to bring suit. GDQ contends that a breach of the notice provision, if any, gives rise only to a claim for a breach of contract and not cancellation of that contract, here, the assignment. GDQ points out that the notice provision is not a condition precedent to an assignment of Note A, because Brass had no right to reject assignment of Note A. GDQ further argues that the assignment of Note A need not be supported by consideration. Finally, GDQ argues that Brass has presented no evidence to indicate that the assignment was made merely to create diversity.

3. Summary of Conclusions

The Court holds that GDQ is a valid assignee of Note A and may sue to collect the outstanding balance. GDQ is an assignee but not a "holder" or a "holder in due course" of Note A, because the Court finds that Note A is a non-negotiable instrument. As an assignee, however, GDQ is still entitled to enforce Note A. Thus, Plaintiff's Motion is granted as to GDQ's status as a valid assignee and granted as to Brass' alleged offsets. The Court dismisses Plaintiff's request for judicial foreclosure without prejudice.

The Court denies Brass's Motion for Summary Judgment in large part. The Court rejects Brass' arguments concerning the invalidity of Jones' assignment of Note A to GDQ, fraudulent creation of diversity, the right of recoupment of $1.5 million plus interest allegedly arising from misconduct by Jones relating to an investment with Brass in 1981, and the right to credits for $265,038.00 and $29,864.00. In terms of the available collateral, the Court

grants Brass' Motion as it relates to collateral securing Note A.

II. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990). The facts are to be reviewed with all "justifiable inferences" drawn in favor of the party opposing the motion. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998), *citing Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986). However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy – that is, when both parties have submitted evidence of contradictory facts." *Laughlin v. Olszewski*, 102 F.3d 190, 193 (5th Cir. 1996).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. If the movant meets this initial burden, the burden shifts to the nonmovant to demonstrate that summary Judgment is inappropriate. *Morris*, 144 F.3d, at 380. This is accomplished by producing "significant probative evidence" that there

is an issue of material fact so as to warrant a trial. *See Texas Manufactured Hous. Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2497 (1997); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 161 (5th Cir.), *cert. denied*, 117 S. Ct. 586 (1996); *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-19 (5th Cir. 1995); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

The nonmovant's burden is to produce evidence "sufficient to support a jury verdict." *Morris*, 144 F.3d at 380. This burden is not met by mere reliance on the allegations or denials in the non-movant's pleadings. *Id.* Likewise, "unsubstantiated or conclusory assertions that a fact issue exists" do not meet this burden. *Id.* Instead, the nonmoving party must present specific facts which show "the existence of a 'genuine' issue concerning every essential component of its case." *Id.* Dispute about a material fact is genuine only if evidence is such that reasonable jury could return a verdict for nonmoving party. *Stafford v. True Temper Sports*, 123 F.3d 291, 294 (5th Cir. 1997); *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992).

In the absence of any proof, the court will not assume that the nonmovant could or would prove the necessary facts. *See McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), *revised on other grounds upon denial of reh'g*, 70 F.3d 26 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc), 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential

to the party's case, and on which that party will bear the burden at trial. *See Little*, 37 F.3d at 1075 (citing *Celotex*, 477 U.S. at 322).

III. DISCUSSION

A. GDQ's Rights Under Note A.

Plaintiff GDQ argues that this case is nothing more than a simple suit for collection of an overdue note. As noted above, Brass asserts various objections and defenses to GDQ's rights to collect Note A. There is threshold issue, however, not briefed by the parties, that must be addressed, namely, whether Note A is negotiable.

1. Negotiability of Note A and GDQ's General Right of Collection

Under Oklahoma law, a writing is negotiable only if it is an unconditional promise to pay money and "does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money." OKL. STAT. ANN. tit. 12A § 3-104. A note is generally non-negotiable if it "is subject to or governed by another writing. . . . " OKL. STAT. ANN. tit. 12A § 3-106. This rule does not apply, however, if the extrinsic writing references only the collateral securing the note, prepayment options, acceleration, or limitations on the source of payment by the promisor. *Id.* Under Oklahoma law, negotiability is generally determined by examining only the face of the instrument. *See Walls v. Morris Chevrolet*, 515 P.2d 1405 (Okla. Ct. App.

1973) (citing BENDER'S U.C.C. SERVICE, HART & WILLIER, COMMERCIAL PAPER § 2.09(3)). Under Oklahoma law,

> it is well-settled that whenever a bill of exchange or a promissory note contains a reference to some extrinsic contract in such a way as to make it subject to the terms of that contract, as distinguished from a reference merely that the extrinsic agreement was the origin of the transaction or constitutes the consideration of the bill or note, the negotiability of the paper is destroyed.

James Talcot, Inc. v. Finley, 389 P.2d 988 (Okla. 1964).

Note A states "This Secured Promissory Note A ("Note A") is made executed, and delivered pursuant to the terms of the Settlement Agreement. . . . " *See* Defendant's Motion, Exhibit 2. Thus, by its own terms, Note A is subject to an extrinsic contract, namely the "Settlement Agreement." This language incorporates the terms of an extrinsic agreement, and is not merely a passing reference to an outside writing. Although the "Settlement Agreement" to which Note A appears to have referred originally was the April 1986 Agreement, the parties have repeatedly indicated that the Note is now governed by the May 1987 Agreement (and possibly two January 14, 1987, Agreements, *see infra*), it is clear that each of these agreements contained terms far more extensive than a description of Note A's collateral, prepayment options, acceleration terms, and limitations on source of payment by Brass. *See* OKLA. STAT. ANN. tit. 12A § 3-106. The May 1987 Agreement, entitled "Amended and Restated Settlement Agreement" (Defendant's Motion, Exhibit 1), covers various topics, such as releases of claims between the

parties, restatement of terms of the FDIC settlement of disputes as to several business settlements creation of an escrow account, creation by Jones of a credit facility for Brass' use, and incorporation of other agreements with complex terms. *See* Defendant's Motion, Exhibits 2, 3, 5 and 6. Thus, the Court finds and concludes that Note A is non-negotiable.[10]

The holder of a non-negotiable instrument still has the power to enforce that instrument. *See Sunrizon Homes, Inc. v. American Guaranty Investment Corporation*, 782 P.2d 103, 105 (Okla. 1989). When a note is not negotiable, the assignee of the note stands in the shoes of the assignor, the original promisee. *Id.* The new holder loses only those protections afforded to holders in due course. In order to bring a cause of action, the assignee has to prove the elements of a valid contract (offer, acceptance, and consideration) and a breach of that contract. *See Horton Insurance Agency, Inc. v. Robinson*, 824 P.2d 397, 400 (Okla. Ct. App. 1992). In this case, there is no question that as a contractual matter Jones assigned his rights of collection to GDQ. Thus, GDQ has the right to enforce Note A; Defendant Brass simply has more defenses available than

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[10] This holding comports with both Brass' and GDQ's interpretation of Note A. Neither party argues that the incorporation clause includes only the April 1996 Settlement Agreement. In fact, each party seems to argue that all four Settlement Agreements are incorporated into Note A. This includes the January 1997 Settlement Agreement which contains provisions concerning the assignment of oil interests to Brass. This reading of the incorporation clause clearly removes Note A from the class of instruments that could be considered negotiable.

if GDQ was a holder in due course of a negotiable instrument.[11]

2. Validity of Assignment of Note A to GDQ

To contravene GDQ's request for summary judgment on Note A, Brass cross-moves for summary judgment declaring that GDQ lacks standing to enforce Note A. Brass claims that the assignment from Jones to GDQ was invalid, and therefore GDQ cannot bring suit on Note A for three reasons: First, Jones allegedly failed to comply with the conditions on assignments set forth in Note A. Second, the assignment allegedly was without consideration and is therefore invalid. Third, Jones allegedly assigned Note A solely to create diversity jurisdiction, and the assignment was merely a collusive attempt to establish diversity jurisdiction in federal court.

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[11] Even if Note A were negotiable, it would have been enforceable by GDQ. Under Oklahoma law, a negotiable instrument may be enforced by "the holder of the instrument" or "a nonholder in possession of the instrument who has the rights of a holder." OKLA. STAT. ANN. tit. 12A § 3-301. A proper transfer of a note occurs "when it is delivered . . . for the purpose of giving to the person receiving the delivery the right to enforce the instrument." OKLA. STAT. ANN. tit. 12A § 3-203. A valid transfer "vests in the transferee any right of the transferor to enforce the instrument." *Id.* There is no evidence in the record to contradict Jones' assertion that he assigned Note A to Plaintiff GDQ so that GDQ could enforce it. Since all Brass' arguments concerning validity of Jones' assignment of Note A to GDQ are insufficient, the Court concludes that GDQ, as a matter of law, has the right to enforce Note A subject, possibly, to the available defenses for negotiable instruments.

Failure to Comply With Terms of Note – Brass argues that Jones failed to give thirty days notice of his assignment to GDQ, as required by the terms of Note A. The relevant provision in the note states:

> This Note A is assignable by Holder upon thirty (30) days advance written notice to Maker, such notice to include the name and address of the assignee and thereafter, all further such assignments are subject to like notice to Maker. . . .

Note A, Plaintiff's Motion, Exhibit 4, at 4.

There is no provision in Note A or in any of the various settlement agreements provided to the Court[12] giving Brass the right to approve or reject any assignment of Note A by Jones, the maker of the note. *Id.*

Jones assigned Note A to GDQ by an assignment agreement, dated May 6, 1997, and a letter agreement bearing the same date. Also on May 6, 1997, Jones sent a letter to Brass informing him of the assignment, identifying GDQ as the assignee and stating that the assignment would become "effective thirty (30) days from the date of this Notice."[13] On May 16, 1997, counsel for Brass sent a letter to Jones stating that Jones' Notice of Assignment was defective with respect to four contractual requirements contained in Note A and the Settlement Agreements.[14] Brass contended that (i) the notice of assignment

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[12] *See supra* note 3.

[13] *See* Notice of Assignment from Jerral W. Jones to Sanford P. Brass, dated May 6, 1997, Defendant's Motion, Exhibit 7.

[14] *See* Letter from Stephen A. Bogorad to Robert C. Bright, dated May 16, 1997, Defendant's Motion, Exhibit 8, at 2.

did not list the address of the assignee, as required by Note A's assignment clause, (ii) the notice was sent by facsimile and not delivered by mail as required by paragraph 17(a) of the May 28, 1987 Settlement Agreement, (iii) Jones' facsimile was notice of a previous assignment rather than notice of a future assignment, and thus it was invalid under the assignment clause, and (iv) Jones' assignment was in excess of the recourse amount of the note. Jones responded to these criticisms by sending Brass (by certified mail and facsimile) a letter dated May 22, 1997, setting forth the address of the assignee. GDQ.[15]

GDQ commenced this action on June 5, 1997, thirty days after Jones' initial notice of assignment and the assignment itself. Defendant Brass again contends that the notice provisions in Note A and the May 1987 Agreement were a condition precedent to any assignment. Since GDQ did not timely perform all the conditions, Brass argues, GDQ cannot enforce the note. GDQ counters that the notice provision was not a condition precedent to assignment and, even if it was a condition precedent, Jones gave adequate notice to satisfy the provision.

Under Oklahoma law, a breach of a contract is material and justifies complete rescission of the contract when "such failure defeats the object of the contract, or when it concerns a matter of such importance that the contract would not have been made if default in that particular

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[15] *See* Letter from Jerry Jones to Sanford P. Brass, dated May 22, 1997, Defendant's Motion, Exhibit 10.

had been expected or contemplated." *Zenith Drilling Corporation v. Internorth, Inc.*, 869 F.2d 560, 563 (10th Cir. 1989) (quoting *Davis v. Gwaltney*, 291 Plaintiff.2d [sic] 820, 823 (Okla. 1955)).[16] Here, Jones' Notice of Assignment was not technically complete in that it did not list the assignee's address. This omission is not material in this case, however. By Brass' account, the purpose of the notice provision was merely to give Brass the opportunity "to advise the proposed assignee of any and all defenses and set-offs that [he] might have under Note A and the Settlement Agreement." *See* Affidavit of Sanford Brass, Defendant's Motion, Exhibit 14, ¶ 8, at 4. Brass states that the notice provision was "inserted in Note A at my insistence, and was one of the material terms that induced me to enter into the Settlement," and "inclusion of this provision assured me that I would have sufficient time to take whatever legal steps might be necessary to preserve any claims I had against Jones." *Id.*

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[16] Defendant cites several Oklahoma cases which hold that the terms of a contract are to be strictly construed in spite of any seemingly unfair results. *See St. Louis S.F.R. Co. v. Phillips*, 87 P. 470 (Okla. 1906); *Bankers Reserve Life Co. v. Rice*, 226 P. 324 (Okla. 1924). These cases, handed down at the beginning of this century, are largely irrelevant to the present dispute. Courts have since moved away from this "freedom of contract" view of contract interpretation, as they have become more cognizant of equitable and other policy considerations when interpreting contracts. *See* E. Allan Farnsworth, Farnsworth on Contracts §1.7 at 24-5 (1990). Defendant also cites cases from jurisdictions other than Oklahoma. While these cases are informative, they have no precedential value for the present dispute. Note A expressly states that its terms shall be interpreted according to Oklahoma law.

Beyond his own conclusory statements, Brass offers no facts or evidence that the notice of assignment clause was a material component of Note A or the parties' complex April 1986 or May 1987 Agreements. Under the terms of Note A, Brass had no right to reject any assignment that was made by Jones. Despite Brass' contention that he needed the thirty day notice in order to take "legal steps" to "preserve" potential claims against Jones, Brass fails to identify a single "claim" against Jones that has or could have been lost due to the allegedly late notice of the assignment or the initial absence of the GDQ's address.[17] Nor did Brass take any steps to notify GDQ of Brass' potential off-sets when Brass received GDQ's address. Brass offers no evidence that Jones' omissions under the notice clause resulted in any actual harm to Brass or to his legal position vis-a-vis Jones. In any event, Brass did receive notice of the assignment thirty days before suit was filed, and the notice stated that the assignment did not become effective for thirty days.[18] Thus, the Court concludes that Plaintiff GDQ's omissions concerning the notice provisions collectively were an immaterial breach of Note A. These omissions do not preclude GDQ from attempting to collect Note A.

Lack of Consideration for Assignment. – Defendant also argues that the assignment to Plaintiff was invalid

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[17] This is especially true given the Court's holding that Note A is non-negotiable. *See supra*, at 12-13. Since GDQ is not a holder in due course, Brass loses none of the defenses that he may have against the original promisee, Jones.

[18] To the extent it was material, GDQ's address was provided to Brass two weeks' later. Nothing in the record indicates that Brass took, or attempted to take, any steps that required GDQ's address.

because it lacked consideration. Under Oklahoma law, a written instrument "is presumptive evidence of consideration." OKLA. STAT. ANN. tit. 15 § 114; *see Silk v. Phillips Petroleum Company*, 760 P.2d 174, 181 (Okla. 1988). In addition, the party seeking to void an instrument has the burden of showing that the consideration is lacking. *Id.*; *see also* OKLA. STAT. ANN. tit. 15 § 115. When the two Jones/GDQ contemporaneous assignment agreements (Defendant's Motion, Exhibits 7 and 8) are considered together,[19] it becomes clear that Jones assigned Note A to GDQ, giving it a fifty percent interest in all collections on the note. In return, GDQ committed to "vigorously pursue enforcement of the promissory note obligations.

Defendant Brass offers virtually no evidence[20] to raise a genuine fact question as to Jones' receipt of this consideration for his assignment of Note A. Instead,

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[19] Separate written agreements executed contemporaneously by the same parties are to be construed together. *See Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (citing *Jim Walter Homes v. Schueneman*, 668 S.W.2d 324, 327 (Tex. 1984)). Arkansas appears to follow the same contract principle as Texas courts. *See Universal Security Ins. Co. v. Ring*, 769 S.W.2d 750, 752 (Ark. 1989). It appears that Jones resided in Arkansas in 1987, *see* Defendant's Motion, Exhibit 1, at 28, but by 1997 had moved to Texas. Jones sent a letter from his office located in Irving Texas. *See* Defendant's Motion. Exhibit 6.

[20] The only evidence that Defendant Brass has submitted concerns the ability of Jones to pay the legal costs of enforcement. *See* Deposition of Jerrel Jones. Defendant's Motion, Exhibit 16, at 9. Brass argues that, given this fact, there is no "legitimate business reason" for Jones' assignment. The details of Jones' arrangement with GDQ are not relevant to the question of consideration. Jones has stated his belief that there is value to him in GDQ shouldering the collection effort, and the Court need not look beyond this view.

Brass argues that Jones has paid some of GDQ's legal fees and has exercised considerable control over the litigation.[21] To the extent Brass' contention is even relevant to the issue of consideration received by Jones, GDQ has rebutted Brass' argument with uncontradicted evidence. GDQ has submitted the affidavit of Michael Rovell, GDQ's attorney in this case, which states that Mr. Rovell's firm has received $143,160.00 in payment from GDQ and that Chambers, President of GDQ, is consulted for all tactical decisions. Affidavit of Michael J. Rovell, Plaintiff's Response, Exhibit 2, ¶ 3-4.

Thus, whether one looks at the assignment documents or the extrinsic evidence as to payment of litigation costs, the Court concludes that GDQ has given consideration for the assignment and the assignment is valid in this regard.[22]

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[21] It appears that the Jones and GDQ have agreed that GDQ must bear the fees and costs of collection of the note, *see* Defendant's Motion, Exhibit 8, but at a minimum, GDQ is paying the costs as incurred.

[22] This issue may be academic in any event since in Oklahoma, an assignor of a note need not have consideration for a valid assignment. *Joplin v. Ely*, 365 P.2d 735, 735 (Okla. 1961). In *Joplin*, the plaintiff sought to collect the balance due on an open account. In the face of the defendant's argument that plaintiff gave no consideration for the assignment, the court held that no consideration was needed for an assignment of an open account. The court stated that "a mere assignee for collection may sue on an assigned claim, and this, although the assignment is without consideration." *Id.* at 736 (quoting 6 C.J.S. ASSIGNMENTS § 125, at 1179). The Oklahoma court pointed out that the obligor of the assigned note loses none of his defenses as a result of the promissee's assignment. *Id.* at 737. Moreover, "in no way is it a matter of slightest concern to him what

Fraudulent Creation of Diversity Jurisdiction. – Brass, in defense of GDQ's claim and motion – supported by *bona fide* documentation – that GDQ is the valid assignee of Note A, seeks summary judgment in the form of dismissal of Plaintiff's claim for lack of jurisdiction. Brass argues that Jones' assignment of Note A was merely a collusive attempt to create diversity jurisdiction. Since jurisdiction appears to exist from a review of GDQ's complaint and the documents before the Court, Brass must proffer sufficient evidence to establish at a minimum that there is a genuine question of fact that there has been collusion or fraudulent assignment designed to create federal jurisdiction. Brass has failed to meet this burden.

Diversity jurisdiction is precluded where "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359. Under § 1359, federal courts

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arrangement between the plaintiff and the original creditor occasioned the assignment . . . it would be a sacrifice of substance to form to permit the defendant to defeat the action. . . . " *Id.* (quoting *Manley v. Park*, 75 P. 557, 558 (Kan. 1904)). GDQ argues that this holding should apply to Note A, which it contends is a negotiable instrument. Brass relies on allegedly contrary case law that holds that an assignee of a note must prove consideration, citing *Commercial Nat. Bank of Muskogee v. Ahrens*, 245 P. 557, 559 (Okla. 1926). Brass' case is completely inapplicable to this dispute since that court's holding was based on a finding that the original assignor's title to the note was defective. *Id.* Notwithstanding these authorities, the Court reaches the merits of the parties' contentions in the preceding text because of its holding that Note A is non-negotiable and the Court has not discerned if the applicability of the *Joplin* case is limited to negotiable instruments or not.

have the general authority to "examine the motives underlying a partial assignment" which improperly creates or destroys diversity. *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990); *see also Smilgin v. New York Life Ins. Co.*, 854 F.Supp. 464, 466 (S.D. Tex. 1994). This determination is resolved "as a simple question of fact." *Grassi*, 894 F.2d at 186. In *Grassi*, the Fifth Circuit upheld the district court's denial of a motion to remand where the plaintiffs, hoping to defeat diversity jurisdiction, assigned a two percent interest in their claim to a citizen of the defendant's home state. *Id.* The court, dismissing the assignee as a fraudulently joined party, noted that the assignment was for a mere two percent of the entire claim, and the original assignor remained a party to the litigation. The court of appeals also found that the district court correctly considered such factors as both the assignor and assignee retaining the same attorney for the litigation, the original holder of the note exercising substantial control over the litigation, and the defendant (the removing party) facing a strong likelihood of prejudice if the case were remanded. *Id.* at 186.

Here, the circumstances are materially different. Jones, apparently now a Texas resident,[23] assigned to GDQ fifty percent of the collections on Note A, not a *Defendant* [sic] *minimus* interest. Jones has proferred a bona fide reason for the assignment: There was anticipated to be, and has been, substantial resistence by Defendant Brass to collection of the note. Jones had an articulable interest in avoiding the front-line responsibility of collection efforts, and GDQ's willingness to

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[23] *See supra* note 19.

relieve Jones of that obligation has value to Jones. These circumstances differ significantly from *Grassi* where the original noteholder assigned only a minute percentage of the total claim and specified no particular reason for the assignment.

Analogizing further to *Grassi*, Brass argues that Jones continued to control the lawsuit after he assigned Note A to GDQ, and that both Jones and GDQ were represented by the same counsel, Robert Bright, when they agreed to and documented the assignment. However, Brass acknowledges that GDQ's litigation attorneys in this case are Michael J. Rovell, Lisa I. Fair, Michael A. Hirsh, and Kirk D. Fredrickson, while Jones, not a party, continues to be represented by Bright.

Defendant Brass next focuses on the communications by Bright with Jones and GDQ during the course of this litigation. Brass argues that continuing contact between Bright and Jones after this suit was filed is evidence that Jones controls this suit. Bright had several meetings and communications with Jones in May and June of 1997, concerning Note A right after the assignment, but had relatively little contact with GDQ during that time. *See* Deposition of Robert C. Bright, Defendant's Motion, Exhibit 17, at 161-76. GDQ persuasively counters that Bright's contacts with Jones and GDQ in May and June 1997 are not suspicious given the fact that they occurred when the assignment was made, anticipation of litigation, and then in the earliest stages of the suit. During that period, GDQ's counsel needed to obtain information through Bright from Jones concerning Note A and related matters. Indeed, Bright was performing his function as counsel to Jones of facilitating the transfer of information

to GDQ and, later, of keeping Jones informed generally about the litigation.

Other evidence supports GDQ's contention that GDQ consistently has retained responsibility for the direction and payment of legal services. GDQ points out that it has paid its counsel $143,160.00 in legal fees for work in this case. *See* Affidavit of Michael J. Rovell, Plaintiff's Response, Exhibit 2.[24] Rovell also states that he consults with GDQ President Chambers on strategic decisions, and that Jones is merely "informed of the progress of the litigation by Robert Bright."

Brass focuses on a $5,000.00 retainer initially paid by Jones to Rovell's firm as litigation counsel. However, GDQ establishes that Jones was reimbursed for this amount. *See* Affidavit of Marilyn Love (Jones' assistant), Plaintiff's Response, Exhibit 7; *see also* Deposition of Jerrel Jones, Defendant's Response, Exhibit 18, at 170-71.[25] The Court thus rejects Brass' argument of fraudulent assignment.

In addition, Brass has offered no evidence of possible prejudice from GDQ's filing this collection case in federal

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[24] Moreover, GDQ's President Chambers reports that GDQ has paid a total of $251,025.37 in attorneys' fees and expenses in an attempt to collect on Note A. See Affidavit of John Ed Chambers, III, Plaintiff's Response, Exhibit 4.

[25] Brass also points to a check for $5,000 dated June 12, 1997, noted to be for legal services written on Jones' account to Michael A. Hirsh. *See* Defendant's Motion, Exhibit 12. Jones explains, however, this check was issued in response to a request from Mr. Hirsch that Jones transfer $15,000 to be used as an initial retainer for fees incurred in collecting the overdue note. *See* Defendant's Motion, Exhibit 11.

court.[26] In *Grassi*, the court focused on the assignor's motive in trying to defeat federal jurisdiction. *See Grassi*, 894 F.2d at 186. Brass offers nothing to indicate that Jones' assignment was motivated by a desire to avoid state court or to create diversity.[27]

Irrespective of the forum, Note A, by its terms, is to be interpreted according to Oklahoma law; thus, neither GDQ nor Jones gain any apparent advantage in Texas state or federal court as far as choice of substantive law is concerned. Brass offers no evidence of possible prejudice to any party from litigation in federal, as opposed to Texas court. Thus, Brass has failed to offer evidence of improper motive for the assignment, and his argument is rejected.[28]

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[26] Brass also has not identified any reason that he would be prejudiced by litigation in federal court.

[27] Indeed, given that Jones is the owner of the Dallas Cowboys football team (Deposition of Jerral Jones, Defendant's Motion, Exhibit 16, at 9), the only National Football League team in Texas, it is counter-intuitive to believe that Jones would seek to avoid Texas state court in favor of a different forum.

[28] Brass' Motion is almost the converse of a motion asserting "fraudulent joinder" in connection with removal jurisdiction. If the analogy is pursued, Brass' contention is meritless. To establish that a defendant has been joined fraudulently in federal court litigation, the removing party must show by clear and convincing evidence either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the non-diverse defendant in state court and thus there in fact is complete diversity between the real parties in interest. Alternatively, the defendant must show by clear and convincing evidence that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. *See Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 319 (5th Cir. 1997); *B., Inc. v. Miller*

B. Brass' Defenses

1. $1.5 Million Set-Off Claim

Brass argues that he is entitled to a credit against any monies due to GDQ based on a claim of recoupment of $1.5 million plus interest. Brass claims that Jones did not adequately convey interests in two oil wells, Nailon #1 and Nailon #2, and some unspecified "dry holes," as was required under the Jones/Brass January 14, 1987 Settlement Agreement, the Arkoma-Brass Agreement, and the May 1997 Agreement. Brass also argues that Jones promised a "1.6 to one" return on these mineral interests, that these wells have not produced this level of profit, and that Jones' representations as to the wells' profitability were fraudulent. Brass' pleadings concerning these matters are confusing; technically, he has pleaded only a breach of contract claim, but now he asserts both contract and fraud arguments.

To the extent that Brass seeks his Fifth Defense of the First Amended Answer to be construed as a pleading of fraud, it is rejected on two grounds. A party pleading fraud must include "the circumstances constituting the fraud . . . with particularity." Fed. R. Civ. Pro. 9(b). Under Rule 9(b), a plaintiff must set forth the "who, what, when, where, and how of the alleged fraud." *U.S. ex rel.*

Brewing Co., 663 F.2d 545, 549 (5th Cir. Unit A Dec. 1981). Analogizing from the removal context, this Court holds that in this case, Brass, as the party seeking to defeat jurisdiction, bears the high burden of demonstrating that diversity jurisdiction is improper by clear and convincing evidence. Brass has failed to do so.

Thompson v. Columbia/HCA, 125 F.3d 899, 903 (5th Cir. 1997) (quoting *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)). In Brass' First Amended Answer, he merely states that Jones "breached his obligation to assign certain oil and gas properties to Brass." *See* Defendant's First Amended Answer to Plaintiff's Original Complaint [Doc. # 13], at 4. Brass' First Amended Answer does not contain averments sufficient to plead fraudulent inducement. Nor does that answer set forth the particular facts giving rise to the alleged fraud.

Moreover, a defendant must plead defenses and counterclaims in its answer. *See* FED. R. CIV. PRO. 12(b). The only way a defendant may assert averments previously omitted is by requesting leave to amend its answer. *See* FED. R. CIV. PRO. 15(a); *see also id.* 13(f). Brass has not requested such leave. Thus, Brass has failed to allege fraud and relief under that theory is denied.

In any event, Brass' $1.5 million recoupment claim[29] – whether it sounds in fraud or contract – is barred by the statute of limitations. Under Oklahoma law, a claim of

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[29] By adopting Brass' characterization of this claim as a claim for "recoupment," the Court does not intend to make any findings or reach any legal conclusions that Brass' contentions concerning the assignments arise from the same contract or transaction as that giving rise to Note A. *See Bank of Oklahoma v. Briscoe*, 911 P.2d 311, 318 (Okla. Ct. App. 1995) (quoting BLACK'S LAW DICTIONARY (4th ed. 1968)). Indeed, although the Court does not definitively decide this issue, indications in the record are that the contracts and transactions were separate; Note A was created as part of the April 1986 Agreement, while the oil and gas assignments were not agreed to by the parties until January 1987, and were the subject of a separate contract of assignment and expanded versions of the parties' settlement.

fraud must be brought within two years of "the discovery of the fraud." *See* OKLA. STAT. ANN. tit. 12 § 95(3). "Discovery" may be actual or constructive. *See Gearhart Industries, Inc. v. Grayfox Operating Company*, 829 P.2d 1005, 1006 (Okla. Ct. App. 1992). Under the doctrine of constructive notice, the statute of limitations for fraud begins when the defrauded party has "the means of discovering such fraud." *Id.* This means that a party asserting a claim of fraud has a duty of due diligence. *Id.*

In the case before the Court, the parties agreed that various oil and gas interests were to be conveyed on January 14, 1987. *See* Defendant's Response, Exhibit 4. Brass claims that he anticipated a return of approximately $3 million in five to ten years. *See* Deposition of William J. Mutryn, Plaintiff's Reply, Exhibit A, at 34.[30] It was expected, however, that most of the oil and gas revenues would accrue at the beginning of this time period. *Id.* In fact, Brass expected to receive approximately $1 million of these revenues in 1989. *Id.* Even assuming that Brass can establish that he acted reasonably in relying on these estimates without undertaking any independent due diligence at the time he entered into this transaction in January 1987,[31] Brass should have made reasonable

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[30] The record contains only the testimony of William J. Mutryn. Brass fails to supply any additional evidence indicating that Mutryn's understanding did not comport with Brass' expectations. Brass was put on notice of GDQ's contentions in this regard by Plaintiff's Reply [Doc. # 44], which cites Mutryn's deposition.

[31] The Court makes this assumption despite the fact that it appears far-fetched. Brass apparently testified in his deposition that he simply relied on Jones' representations in all respects in

inquiries by the end of 1989 to determine why the wells' returns were not meeting expectations, and thus make inquiry into whether Jones' alleged statement that the wells would produce a return of "1.6 to one" was accurate or truthful.

To the extent that Brass' putative fraud claim is based on Jones' statements that he owned all the mineral interests purportedly conveyed or allegedly promised, it is also time-barred. Brass should have learned about the title issues no later than the time that the assignments

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connection with the assignments. *See* GDQ's Reply, Exhibit B, at 8. At or prior to closing the transaction on the assignments, Brass appears to have performed no independent investigation or due diligence as to Jones' ownership of mineral interests, the accuracy of the assignment documents, or anything else. All Brass had to do was to check with public or other records to ascertain the performance of the promised wells, which were marginal if not dry holes and had issues as to Jones' title. *See* Deposition of Marilyn Love, GDQ's Motion, Exhibit 15, at 2 (discussing dwindling production from Nailon Wells # 1 and 2 from 1982 to 1985). Brass' unquestioning reliance conceivably might be deemed reasonable if Jones had been Brass' fiduciary or agent. In the circumstances presented, however, this reliance appears unjustified since Jones and Brass were entering into an arms' length transaction as adverse contracting parties attempting to effectuate a "business divorce." Jones had no fiduciary obligation to Brass. Under Oklahoma law, a party asserting fraud must show that he justifiably relied upon an allegedly fraudulent misrepresentation. *See Buford White Lumber Co. Profit Sharing and Savings Plan & Trust v. Octagon Properties*, 740 F.Supp. 1553, 1570 (W.D. Okla. 1989) (citing Southwestern Bell Tel. Co. v. Brown, 519 P.2d 491, 485 [sic] (Okla. 1974). The complaining party therefore must use reasonable care in relying upon another's representations. On the record presented, Brass' reliance does not appear reasonable, but the Court need not decide this issue at this time.

were made on January 14, 1987. Therefore, any fraud claim that Brass might have was barred by the statute of limitations on January 14, 1989.

Brass' contract theory also is untimely. The Oklahoma statute of limitations for contractual claims is five years. *See* OKLA. STAT. ANN. tit. 12, § 95(1). This period begins to run "when the cause of action accrues" or "the time when the plaintiff could first maintain his action to a successful result." *See Turner v. Sooner Oil & Gas Co.*, 243 P.2d 701, 705 (Okla. 1952). Thus, as discussed elsewhere, Brass' claims that Jones did not properly convey all the promised mineral interests accrued at or about the time the purported assignments were made in January 1987.

Under Oklahoma law, a time-barred claim generally cannot be asserted as a counterclaim. *See* OKLA. STAT. ANN. tit. 12, § 2013(c). If a time-barred claim arises out of the same transaction as the plaintiff's claim, it generally may be asserted in spite of the fact that it is barred under the statute of limitations. *Id.* This exception does not apply, however, "where a counterclaim was barred by a statute of limitation *before* the claim of the opposing party *arose*." *Id.* (emphasis added). In these latter circumstances, "the time-barred counterclaim cannot be used for any purpose." *Id.*

Jones' claim under Note A arose on June 6, 1992, when Note A matured and was not fully paid. Jones' assignment of the oil interests to Brass took place on January 14, 1987,[32] when Brass' contract claim that the

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[32] Again, the Court assumes solely for the sake of this discussion (but does not hold) that Brass' claim on the oil and

interests were not properly assigned arose. At the closing on the Jones/Brass/Arkoma settlement, ordinary due diligence concerning the proposed oil and gas assignments would have revealed the alleged errors in the actual conveyances. Thus, on or before January 14, 1987, Brass should have realized that Jones did not in fact accomplish all of the conveyances Brass claims Jones was to make. Brass should have recognized in the exercise of ordinary diligence the existence of the errors of which Brass now complains.

In sum, Brass' contract claim relating to Jones' failure to make all the agreed oil and gas assignments became time-barred on or about January 14, 1992.[33] Brass' possible fraud claims should have been apparent in or before 1989, and his putative fraud allegations were time-barred no later than 1991. Jones' claim on Note A (assigned to GDQ) arose in June 1992, and therefore arose after Brass' claims had become time-barred. Brass accordingly cannot assert his fraud or contract claims concerning the failure of Jones to make proper assignments of oil and gas interests in the present case.

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gas assignments arises from the same contract and transaction as the debt evidenced by Note A. Without this connection, recoupment is not available to Brass at all.

[33] Indeed, if Brass contends that Jones made similar statements in May 1987, Brass' contract claim nevertheless would be time-barred since Jones' claim on Note A did not arise until June 1992.

2. Accounting of Sums Due under Note A

Brass also argues that summary judgment in favor of GDQ on Note A is not appropriate because there is a fact issue regarding the exact sum due under that note. Brass argues that GDQ failed to credit his account for a payment of $265,038.00 made on January 14, 1987, and failed to give him credit for $29,864.00 arising from an alleged obligation Jones owed Brass in connection with taxes on collateral for the notes. GDQ has presented a report prepared by its accountant, George Mitchell, consisting of a detailed accounting of all payments made by Brass. The report reflects that Brass's payment of $265,038.00 was credited on January 29, 1987. *See* Plaintiff's Motion, Exhibit 7, Ex. A. Brass has not offered any evidence contradicting Mitchell's conclusion. Thus, the Court must conclude that GDQ's figure of the sum due on Note A has accounted for Brass' payment of $265,308.00 in January 1987.

In regard to Brass' claim concerning Jones' $29,864.00 obligation, GDQ states that it will concede this amount to Brass in order to obtain summary resolution of this case. The Court accepts this offer, and will reduce the sum found due and owing on Note A as of August 1, 1998, to be $5,023,381.80.

3. Collateral Securing Note A

In his Motion for Summary Judgment, Brass argues that GDQ's foreclosure remedies under Note A are limited by the May 1987 Agreement. This argument responds to the "Second Claim" in GDQ's Complaint [Doc. # 1]

seeking an order of foreclosure on the collateral securing Note A. Brass requests that the Court hold as a matter of law that the May 1987 Agreement precludes foreclosure as to collateral for Note A that also secures Notes B and C. GDQ replies that its claim for foreclosure was "premature" and "voluntarily withdraws" this "claim." GDQ thus has made no substantive response to Brass' interpretation of the May 1987 Agreement (or the predecessor settlement agreements) on the issue of the scope of collateral to which GDQ is entitled to foreclose to satisfy a judgment on Note A.

Under the Federal Rules of Civil Procedure, a plaintiff cannot unilaterally "withdraw" its claim at a mature stage of the litigation.[34] It is unclear whether GDQ wishes to dismiss the second count of its Complaint or merely postpone consideration of arguments concerning that claim. GDQ cannot do either in the current posture of this case.

Plaintiff requested "withdrawal" well after Brass filed its Answer to GDQ's Complaint. A plaintiff cannot unilaterally dismiss a claim after the adverse party has filed its answer. *See* FED. R. CIV. PRO. 41(a)(1). In order to dismiss a claim after an answer has been filed, a plaintiff must obtain a court order. *Id.* Alternatively, a plaintiff may seek leave to amend its complaint to dismiss claims it no longer wishes to pursue in the forum in which the case is pending. Fed. R. Civ. P. 15(a). In this case, GDQ has done neither. Therefore, Brass' summary judgment

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[34] The term "withdraw" is not a recognized term in the Federal Rules of Civil Procedure.

argument concerning foreclosure is ripe and stands before the Court without opposition. The Court will address it.

Brass correctly argues that GDQ's foreclosure remedies are limited by the language in the May 1987 Agreement. That agreement contains two limitations on GDQ's foreclosure remedy. First, Jones "shall have no recourse against Brass' principal residence or assets owned by Brass' spouse." *See* Defendant's Motion, Exhibit 1, at 8. Second, Jones is precluded from foreclosing on assets that also secure Notes B and C. *Id.* at 9. Brass argues that this latter prohibition includes the following assets:

> (1) All interest of Brass in the Sentry Entities except for the claim specifically described in Section 6(a) hereof (until Note C comes due or is paid in full);
>
> (2) All interest of Brass in the Mutual Entities (until Note C comes due or is paid in full);
>
> (3) Brass' rights to cash distributions from Petro-serve Services, Inc. and Trifinery, a Texas joint venture, as defined and limited in Section 6(f) hereof but specifically excluding any interest in or proceeds attributable to the South Tank Farm as set forth in Section 6(f) hereof.

See Defendant's Motion, at 25. This definition accurately reflects the terms of the May 1997 Agreement and GDQ has not objected to this limitation on the Note A collateral. Therefore, the Court grants Brass' Summary Judgment Motion to the extent it seeks to limit the collateral securing Note A.

The Court construes GDQ's "withdrawal" of its claim for foreclosure as a request to cease pursuit of foreclosure procedures at this time and thus is a request to dismiss that claim at this time without prejudice. Therefore, the Court dismisses the Second Claim of GDQ's Complaint without prejudice pursuant to Rule 41(a)(2) insofar as GDQ seeks by that claim to implement foreclosure remedies on any specific assets. *See* FED. R. CIV. PRO. 41(a)(2). This dismissal does not prejudice GDQ's rights to pursue foreclosure (or other collection) proceedings at a later date pursuant to the May 1987 Agreement as interpreted herein.

IV. CONCLUSION AND ORDER

Based on the reasons enumerated above, the Court concludes that Brass' Motion for Summary Judgment [Doc. # 32] should be denied with respect to GDQ's status as a holder of Note A, and granted as to the extent of collateral available for foreclosure as to Note A. The Court further holds that Plaintiff's Motion for Summary Judgment [Doc. # 36] should be granted. The Second Count of Plaintiff's Complaint [Doc. # 1] is dismissed without prejudice. It is therefore

ORDERED that Plaintiff's Motion for Summary Judgment [Doc. # 36] is **GRANTED and $5,023,381.80 is due and owing under Note A as of August 1, 1998.** It is further

ORDERED that Defendant's Motion for Summary Judgment [Doc. # 32] is **DENIED in large part,** but is **GRANTED** as to the scope of collateral subject to foreclosure in connection with Note A. It is further

ORDERED that the Second Claim of Plaintiff's Complaint [Doc. # 1] is **DISMISSED without prejudice.**

SIGNED at Houston, Texas this 31st day of October, 1998.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GDQ CORPORATION,	§	
	§	
Plaintiff,	§	CIVIL ACTION
	§	NO. 8-97-1936
v.	§	
	§	
SANFORD P. BRASS	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER
(Filed Dec. 23, 1998)

Pending before the Court is Defendant Sanford P. Brass' Motion for Reconsideration [Doc. # 50] ("Brass' Motion") of the Court's October 31, 1998 Memorandum and Order ("Memorandum") granting Plaintiff's Motion for Summary Judgment [Doc. # 48]. The Court has considered Brass' motion, Plaintiff GDQ Corporation's ("GDQ's") response and the entire record in this case.

Brass' Motion for Reconsideration is granted as to the question of this Court's jurisdiction. The Court's Memorandum and the related Final Judgment, also signed October 31, 1998, are vacated pending the Court's resolution of specified fact questions outlined below and reconsideration of this Court's jurisdiction in light of the resulting factual findings.

I. RELEVANT FACTUAL BACKGROUND

This dispute concerns the assignment and subsequent collection attempts of an instrument, Note A, that

Brass signed in favor of Jerral Jones ("Jones").[1] Note A matured in 1992. Brass then was and remains in default of the Note's payment terms. On May 6, 1997, Jones assigned Note A (or the right to collect the "Recourse Amount" due under the Note) to GDQ Corporation ("GDQ") for collection. *See* Plaintiff's Motion for Summary Judgment [Doc. #36], Exhibit 5. GDQ, as assignee, filed this suit on June 6, 1997, the day before the Oklahoma statute of limitations expired, seeking to collect the amount due and owing on Note A. *See* Plaintiff's Motion for Summary Judgment, Exhibit 4.

II. ISSUES FOR RECONSIDERATION

In his Motion, Brass argues that this Court lacks subject matter jurisdiction over this dispute, citing for the first time 28 U.S.C. § 1359. This Court originally held that jurisdiction was proper under the federal diversity statute, since GDQ is a citizen of Arkansas and Brass is a Texas resident. *See* 28 U.S.C. § 1332. Because the amount in controversy is the unpaid balance due under Note A, and this sum is well above the $75,000 jurisdictional minimum, the Court found that diversity jurisdiction was proper.

The Court also rejected Brass' arguments of lack of consideration based on the writings between payee,

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[1] As stated in the Court's October 31, 1998 Memorandum and Order, Note A is a non-negotiable instrument. *See* Order, at 13.

Jones, assignor, and assignee GDQ, reflecting that GDQ will recover 50% of the sums collected on Note A.[2]

An initial finding of subject matter jurisdiction, however, is never conclusive. *See* Fed.R.Civ.P. 12(h)(3) ("*Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the matter"). District courts have a continuing duty to ensure that subject matter jurisdiction is proper throughout the adjudicative process. *See* CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1393, at 772-73.

Section 1359 states that, "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke jurisdiction of such court." Brass argues that the assignment of Note A was a sham transaction designed to fabricate diversity jurisdiction. While the Court initially concluded there was no genuine question of material fact on this issue, the Court now concludes that a fact question exists requiring an evidentiary hearing.

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[2] There appears to be some ambiguity as to who will bear the costs of collection: the Jones/GDQ letter agreement dated May 6, 1997 states that GDQ will pay Jones "50% of the proceeds of collection, if any, *net* of all legal fees and related collection expenses incurred by GDQ in its efforts to secure payment of the amounts due and owing on the note." In the very next sentence, however, GDQ inconsistently agrees to bear all collection fees and expenses. *See* Brass' Motion for Summary Judgment, Exhibit 6.

The Court has concerns about the timing of the assignment, barely one month before the Oklahoma statute of limitations expired, the fact that the assignment was to Jones' brother-in-law, who apparently operates a one-employee company, and the fact that the terms of the assignment are potentially ambiguous. Another open issue is whether GDQ is a legal entity truly distinct from Jones. In addition, the fact that affiants Michael J. Rovell and John Ed Chambers failed to sign their declarations originally, and to date have not submitted valid declarations, undermines the validity of their averments as to the role of litigation counsel for GDQ, in contrast to Jones' personal attorneys. These matters require further examination before the Court can satisfy its duty under § 1359. Thus, the Court will require a hearing to determine if the assignment relating to Note A was *bona fide* or was merely a collusive attempt by Jones to substitute a diverse Plaintiff, GDQ.

Independent of the foregoing, the Court seeks more information as to the circumstances of the execution of the agreement to assign Note A. These matters are necessary to this Court's resolution of the choice of law issues applicable to evaluating the legal viability of the assignment.

For these reasons, the Court hereby schedules a pretrial conference for January 14, 1999, at 8:30 a.m. The parties shall be prepared at the conference to estimate the time necessary to present evidence concerning the circumstances of the assignment of Note A. The Court notes that GDQ, as the party seeking to invoke diversity jurisdiction, has the burden of establishing that diversity is

proper. *See Harvey Construction Company v. Robertson-Ceco Corporation,* 10 F.3d 300, 303 (5th Cir. 1994).

III. CONCLUSION

For the reasons, and to the extent, set out above, the Court grants Defendant's Motion for Reconsideration [Doc. # 50] as to matters pertaining to the assignment by Jones to GDQ concerning Note A. Since these matters may affect this Court's subject matter jurisdiction, the Court's October 31, 1998 Memorandum and Order [Doc. # 48] and Final Judgment [Doc. # 49] are vacated until the jurisdictional question is resolved.

The Court does not by this Order intend to address any other issues at the hearing, and will not entertain evidence (or reopen the record) on other matters briefed by the parties. Accordingly, it is hereby

ORDERED that the Motion for Reconsideration [Doc. # 50] is **GRANTED**. It is further

ORDERED that the Court's October 31, 1998 Memorandum and Order [Doc. # 48] and Final Judgment [Doc. # 49] are **VACATED** in their entirety. It is further

ORDERED that a pretrial conference is scheduled for **January 14, 1999, at 8:30 a.m.** to establish a schedule for a hearing on the factual issues related to the assignment by Jones to GDQ pertaining to Note A, which issues relate to this Court's subject-matter jurisdiction.

SIGNED at Houston, Texas, this 23d day of December, 1998.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GDQ CORPORATION,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
v.	§	H-97-1936
SANFORD P. BRASS,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

(Filed Sep. 02, 1999)

Pending in this negotiable instruments case is Defendant Brass's Motion for Reconsideration[1] ("Brass's Reconsideration Motion") [Doc. # 50]. Plaintiff has responded in opposition. *See* Plaintiff's Response to Brass's Motion for Reconsideration ("GDQ's Response") [Doc. # 54]. On December 23, 1998, the Court issued an Order [Doc. # 57], vacating a Memorandum and Order ("Memorandum") [Doc. #48] and the associated Final Judgment [Doc. # 49], each dated October 31, 1998, based on the concern that jurisdiction might be lacking pursuant to 28 U.S.C. § 1359,[2] because shortly before suit was filed, various

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[1] The Court deems Brass's motion to be a motion to "alter or amend the judgment" pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The motion is timely, having been filed within ten business days of the entry of the judgment about which movant complains.

[2] Section 1359 states that, "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke jurisdiction of such court." 28 U.S.C. § 1359.

rights under Note A were assigned by its original holder, Jerral Jones, to GDQ Corporation, ("GDQ") an Arkansas entity owned by Jones's brother-in-law. The Court recently held a hearing on various factual issues pertaining to creation of Note A and the related assignment.

On the basis of evidence submitted at the hearing, the Court finds that Note A was not collusively or improperly assigned to invoke federal jurisdiction, and thus, the Court concludes that it has jurisdiction to determine Plaintiff's claims. The Court, therefore, proceeds to consider the balance of Brass's Reconsideration Motion, and concludes that none of the issues raised by Brass have merit. Therefore, the Court vacates its December 23, 1998 Order and reinstates its Original Memorandum granting summary judgment for Plaintiff.

I. FACTUAL BACKGROUND

This dispute arises from an instrument ("Note A") signed by Defendant Sanford Brass in favor of Jones on June 6, 1986, and assigned by Jones to GDQ in May 6, 1997, after Brass allegedly had been in default on repayments under the note for approximately seven years. In the summary judgment proceedings, Defendant argued generally that GDQ could not enforce Note A in federal court. First, Brass asserted that the assignment of interests in Note A by Jones to GDQ was not lawful. Second, Brass argued that if Note A was properly assigned, he was entitled to certain set-offs, the sum of which exceeded the outstanding balance on Note A. Specifically, brass asserted both a contract claim and a fraud claim against Jones in relation to Jones's assignment of certain

oil and gas interests, which had been transferred by Jones to Brass in partial consideration for Note A. Finally, Brass argued that the terms of Note A limited GDQ's foreclosure rights.

All but the last of Brass's arguments were rejected when this Court issued its Memorandum and Order ("Original Memorandum"), dated October 31, 1998, granting summary judgment in favor of Plaintiff, GDQ. In its Original Memorandum, the Court held that GDQ could enforce Note A, and that Brass's contract and fraud claims were barred by the applicable Oklahoma statute of limitations. In regard to GDQ's foreclosure remedies, the Court endorsed Brass's interpretation of the parties' pertinent documents and dismissed the Second Claim of Plaintiff's Complaint [Doc. #1] without prejudice. Final Judgment was entered in favor of GDQ allowing collection of Note A on November 2, 1998.

Brass filed a Motion for Reconsideration on November 17, 1998, requesting that the Court issue a "revised Summary Judgment reflecting that fact issues remain as to Brass's recoupment claims and that GDQ's claims on Note A are barred as a matter of law by the applicable statute of limitations." Brass's Reconsideration Motion, at 10. In his Reconsideration Motion, Brass advances four arguments. First, Brass argues that the effective date of the parties' business divorce (the "Brass-Jones 'business divorce' settlement") was June 8, 1987, and that the Court erred in rejecting Brass's "defensive claims," when the Court held that the effective date of a part of that settlement (certain oil and gas assignments pertaining to the Nailon #1 and Nailon #2 wells) was January 14, 1987. Second, Brass contends that this Court erred in applying

Oklahoma statutes of limitations to this case, because Texas choice of law principles dictate that the Court apply the applicable Texas limitations periods, which would preserve certain defensive claims dismissed by the Court. Finally, Brass asserts a claim of champerty against Jones, on the grounds that the assignment of Note A was without consideration and, therefore, was an illusory assignment. Brass also argues that this Court lacks subject matter jurisdiction over this dispute, citing 28 U.S.C. § 1359 and making the related contention that the assignment of Note A was a collusive or improper transaction designed to fabricate diversity jurisdiction.[3]

Since an initial finding of subject matter jurisdiction is never conclusive, *see* FED. R. CIV. P. 12(h)(3) (*"Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the matter"), the Court ordered that a hearing be held on factual disputes relating to the jurisdictional issue. *See* CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1393, at 772-73 (continuing duty exists to ensure that subject matter jurisdiction is proper throughout the adjudicative process). This hearing has held on August 11, 1999 after various requests by the parties for continuances.

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[3] This argument challenged the Court's original holding that federal diversity jurisdiction existed since GDQ is a citizen of Arkansas and Brass is a Texas resident. *See* 28 U.S.C. § 1332. There is no dispute that the amount in controversy, the unpaid balance due under Note A, is well above the $75,000 jurisdictional minimum.

At the hearing, three witnesses testified: Jerral Jones; his brother-in-law and principal of GDQ, John Ed Chambers, III; and corporate transactions attorney, Robert C. Bright. Bright represented both Jones and GDQ in connection with the assignment. Bright had represented Jones for years in many of the transactions with Defendant, and he had also represented other entities controlled by Chambers in isolated other matters. Plaintiff submitted affidavits from Chambers, Michael J. Rovell (litigation counsel for GDQ who also had ten years earlier represented Jones) and Bright. Defendant submitted extensive excerpts from depositions of Bright, Marilyn Love and Rovell, in addition to dozens of other exhibits. These exhibits also include invoices for legal services to GDQ from Michael Rovell and from Bright & Barnes, Bright's firm. Also included in Defendant's submission were cellular telephone records of Rovell. Both parties also submitted supporting memoranda of law.[4]

II. DISCUSSION

The Court concludes, as it originally held, that it has diversity subject-matter jurisdiction in this case. The parties to the assignment relating to Note A entered into a *bona fide* financial transaction potentially lucrative for the assignee as well as the assignor; they did not enter into

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[4] *See* Plaintiff's Memorandum in Connection with the Evidentiary Hearing on Subject Matter Jurisdiction [Doc. # 74]; Defendant's Memorandum on Jurisdiction [Doc. # 75]. *See* Defendant's Reply Brief Regarding Jurisdictional Issues [Doc. # 81].

the assignment for the purpose of creating federal jurisdiction. In addition, the Court finds that Plaintiff's legal claims are not champertous or otherwise invalid under Oklahoma or Texas law. Therefore, the assignment is valid and diversity jurisdiction exists.

The Court, therefore, considers the balance of Brass's Motion for Reconsideration. The Court concludes that the Reconsideration Motion does not raise arguments that warrant disturbing the conclusions set forth in the Original Memorandum. Thus, the Court vacates the December 23, 1998 Order and reinstates its Original Memorandum granting summary judgment to Plaintiff.

A. Jurisdictional Issues

1. 28 U.S.C. § 1359

a. Applicable Legal Standard

Defendant contends that federal jurisdiction was improperly created by Jones's partial assignment relating to Note A. Federal law provides that "a district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359. The Supreme Court has noted that § 1359 is particularly applicable in cases, such as this, where diversity jurisdiction was created by a partial assignment. *See Kramer v. Caribbean Mills, Inc.*, 394 U.S 823, 828 (1969).

The applicability of § 1359 to a particular case is determined through a factual inquiry based on federal law. *See id.*, at 829; *Grassi v. Ciba-Geigy Ltd.*, 894 F.2d 181,

186 (5th Cir. 1990) (the issue of whether assignment was made improperly to create or destroy jurisdiction "is to be resolved as a simple question of fact."). *Kramer* involved an "assignment [that the parties admitted] was in substantial part motivated by a desire by [plaintiff's] counsel to make diversity jurisdiction available." *Kramer*, 394 U.S. at 828. In *Kramer*, the assignment was solely for purposes of collection with the assignee to retain merely 5% of the net proceeds "for the use of his name and his trouble in collecting," *Id.* at 827-28 (internal quotation marks omitted). If the suit was unsuccessful, the assignee (Kramer) was going to lose only $1.00, plus costs. *Id.*

In the Fifth Circuit, the inquiry under § 1359 is guided by the "motive/function" rule. *See Bianca v. Parke-Davis Pharmaceutical Division of Warner-Lambert Co.*, 723 F.2d 392, 397 (5th Cir. 1984) (out-of-state relative of Texas decedent appointed as administrator of estate for the purpose of prosecuting wrongful death litigation against Texas defendant held sufficient to support diversity jurisdiction).[5] An assignment is invalid under § 1359 in the

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[5] This motive/function rule is not uniformly accepted among the federal circuit courts. *See Pallazola v. Rucker*, 797 F.2d 1116 (1st Cir. 1986) (noting the split in circuits; some circuit courts apply instead a "substantial stake" test). Indeed, the Fifth Circuit acknowledged this split in *Bianca* in discussing the proper test for § 1359 jurisdictional challenges. *See Bianca*, 723 F.2d at 397. The Court rejected the "substantial stake" test adopted by the Fourth Circuit in *Bishop v. Hendricks*, 495 F.2d 289, 294-95 n.23 (4th Cir. 1974), in which a court's determination of jurisdiction is dependent upon whether or not the assignee (with the diverse citizenship) had a substantial stake in the litigation. The Fifth Circuit concluded that the substantial stake test contravened the plain meaning of § 1359 which precludes

Fifth Circuit only when there is evidence establishing an intent to manufacture federal diversity jurisdiction. *Id.*[6]

Defendant argues that *Harrell & Sumner Contracting Co. v. Peabody Peterson Co.*, 546 F.2d 1227 (5th Cir. 1977), compels the conclusion that there is no jurisdiction in this case. The Court is unpersuaded that *Harrell* is authority for Defendant's position. In *Harrell*, the plaintiff brought an action to collect for extra work that the plaintiff and Tackett (business partners) were required to perform on a construction project. Plaintiff and Tackett were joint venturers. One month prior to the suit, Tackett assigned to plaintiff its interest in the suit, but Tackett retained a one-

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improper or collusive assignments that are made *"to invoke* jurisdiction." *Id.* at 398 (emphasis added by court).

[6] Defendant relies heavily on the Ninth Circuit case of *Attorney's Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 597 (9th Cir. 1996), that rejected the Fifth Circuit's "motive/function" test. *See* Defendant's Response to Plaintiff's Memorandum Jurisdiction [Doc. #78]. The Ninth Circuit, ignoring the statutory language of § 1359, stated "[c]ertainly there is no reason to give motive controlling weight in every case. . . . " *Id.* The Ninth Circuit recognized the circuits' split of opinion regarding the relative importance of motive, purpose or intent in the § 1359 analysis. *Id.* at 596. The Ninth Circuit's holding is not binding on this Court, and this Court will not follow it. The Court notes that the Ninth Circuit in *Attorney's Trust*, despite that court's disavowal of any consideration of intent or motive, did in fact consider those matters, and held that plaintiff's proffered explanation for the assignment was unconvincing. *Id.* at 599. In the *Attorney's Trust* case, the assignment in issue was part of a transaction that was obviously a sham for the purpose of creating federal jurisdiction. As indicated by the Court's findings of fact below, the facts of *Attorney's Trust* are factually distinguishable from the circumstances at bar.

half interest in any proceeds from that suit. The court first found that Tackett was an indispensable party under Rule 19(a). The court of appeals then held the "lack of economic substance to the assignment along with the district court's finding that the reasons for the assignment were legal and tactical was tantamount to a finding that the assignment was 'improper or collusive' within the meaning of § 1359." *Harrell*, 546 F.2d at 1229. The circumstances in *Harrell* are materially different from the ones at bar, and *Harrell* does not govern the analysis in this case. First, Jones and GDQ were not joint venturers. Second, the district court in *Harrell* explicitly found that the assignment was made for tactical purposes. This latter point not only distinguishes *Harrell* from this case, but represents another, earlier, example of the Fifth Circuit's emphasis on motive in § 1359 analysis.

b. Findings of Fact and Conclusions of Law

The evidence introduced at the August 1999 hearing convinces the Court that neither Jones, Chambers, GDQ, nor Bright, the only parties involved in the assignment of Note A, acted collusively or improperly to create federal jurisdiction through the assignment. The Court, on the basis of the record developed at the August 1999 hearing finds the following.

Note A *per se* was not assigned to Chambers or GDQ. Rather, Jones assigned a substantial portion of the recourse amount of Note A to GDQ. (For ease of reference, however, the Court will refer to the transaction as simply an "assignment of Note A," since the parties do

not raise any issues concerning what precise interest was assigned.)

GDQ is a privately held corporation owned exclusively by Chambers. Jones agreed that in exchange for GDQ taking steps to collect Note A, GDQ would receive fifty percent of all amounts collected from Note A. GDQ also agreed to bear all of the costs incurred in the collection of Note A. GDQ, in fact, has paid all legal fees incurred thus far, which total hundreds of thousands of dollars. Jones retains the remaining fifty percent interest in the recourse amount of Note A and will receive fifty percent of all sums collected. Rovell is litigation counsel for GDQ in this collection suit. Bright continues to represent Jones in connection with Note A. Bright has also represented GDQ to a limited extent.[7]

The Court generally credits the testimony of Jones, Chambers, and Bright, as well as the testimony of Rovell introduced by deposition and in oral argument at the August, 1999 hearing.

Jones, Chambers, and Bright did not assign Note A collusively or improperly for the purpose of creating diversity jurisdiction. Jones convincingly explained at the hearing that he made the assignment to GDQ, because he did not have the time or desire to personally continue efforts to collect on the note. The note had been in default

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[7] At the August 1999 hearing, Bright testified that he represented both Jones and GDQ on the initial assignment of Note A. *See* Transcript of August 11, 1999 Hearing [Doc. # 80], at 136.

for years and prior collection attempts had failed.[8] Jones trusted Chambers, his brother-in-law and an experienced banker, to proceed quickly with appropriate collection steps, including litigation. In addition, Jones, as owner of the Dallas Cowboys, a high profile sports organization dependent on good public relations, understandably sought to avoid adverse publicity that might arise from his personal, front-line litigation on this substantial debt. Jones also did not want to draw public attention to his personal business matters or be required to spend substantial time on the litigation.[9]

Jones, Chambers and Bright did not recognize the federal jurisdictional consequences of the assignment. Neither Jones nor Chambers takes any interest in the legal aspects of the collection of Note A. Neither Jones nor Chambers spoke to Rovell or anyone else about the forum of any collection lawsuits, although each was aware generally that litigation was likely to collect Note A. Bright testified convincingly and without contradiction that he has not ever represented clients in litigation, as his practice is confined to transactional work. The Court also credits Bright's testimony that he did not participate in (and was unaware of) any conversations discussing the possible effect of the assignment on the

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[8] This testimony was consistent with Jones's deposition testimony cited in this Court's Original Memorandum, at 4.

[9] Defendant points to the time Jones has spent on this matter. This argument is unpersuasive. Jones's time since the initial few moments after the assignment has been attributable to the demands of the defense focused on attacking jurisdiction or during settlement negotiations in which the Court required Jones's involvement.

forum for the collection litigation on federal diversity jurisdiction until after the transaction was completed and Rovell recommended filing in federal court. There is simply no evidence that meaningfully supports Defendant's contrary position.

The Court finds further that the communications between attorneys Rovell and Bright with each other and with Jones at the early stages of this litigation were to gather information and documents necessary to GDQ and its counsel to prosecute this suit, such as matters relating to the creation of Note A. Thereafter, some communications occurred between Rovell and Bright, or between these attorneys and Jones to provide Jones with status reports about the collection efforts (both litigation and settlement negotiations).[10] Jones and Chambers also had numerous conversations on other matters.

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[10] The evidence demonstrates that the attorneys, Rovell and Bright, were the primary strategists and daily decision-makers on the lawsuit. Bright, Jones's prior attorney in these matters, was the person with more detailed knowledge of the agreements and transactions, and for practical reasons had to be the point person for fact gathering and other work necessary at the outset of the litigation. Bright and Rovell worked in tandem to gather information and educate all concerned about pertinent matters. This cooperation is not unexpected under the circumstances where GDQ, Chambers and Rovell had no prior involvement in the Jones/Brass matters. Bright and Rovell appear to have gathered information from Jones and his staff (as well as Bright's own files) to prepare for and handle the litigation at the early stages. Jones and his staff had the first-hand information concerning the creation of Note A and prior collection efforts. The various phone calls or contacts between or among Bright (who continued to represent Jones after this suit was filed), Rovell (litigation counsel for GDQ), and Jones (or his office), but not with GDQ, during the first two months

The Court also finds that GDQ, through its principal, Chambers, now has, and has had since the assignment, full responsibility for collection of Note A. There is insufficient evidence to persuade the Court that Jones controls the litigation in any way. It appears that Jones is made aware of events in this suit after the decisions are made and implemented.[11]

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the litigation was pending does not suggest of collusion concerning jurisdiction. *See infra* note 11. Moreover, Bright's phone calls to Jones were consistent with Bright's continued representation of Jones on other business matters, as he testified.

[11] In order to demonstrate the alleged collusive nature of the Note A assignment, Defendant offers a summary of the contracts between Rovell and Jones. *See* Defendant's Exhibit ("DX") 46; *see also* Defendant Sanford P. Brass's Reply Brief Regarding Jurisdictional Issues ("Brass's Reply Brief") [Doc. # 81]. Plaintiff has responded by arguing that DX 46 is without foundation and misleading. *See* Plaintiff's Objection to Brass Exhibit 46 [Doc. # 77]. On the basis of the Court's perception of the live witnesses' demeanor and testimony, as well as a detailed review of the documents on which Defendant relies, the Court rejects Defendant's arguments that there were unusually extensive communications between GDQ's attorney and Jones (the assignor) or Jones's attorney, Bright, pertaining to the litigation. The testimony of Rovell in his deposition and in open court are reliable and credible. *See* Deposition of Michael J. Rovell, Defendant's Exhibit 45, at 13-14. Similarly, the Court credits Bright's testimony at the hearing and in his deposition. Many of the contacts on which Defendant relies are not probative of his theory of a collusive or improper assignment. For example, various contacts listed by Defendant between Rovell or Bright and Jones were for matters unrelated to this litigation or Note A, or were on personal matters. *Id.* In addition, the times during which many of the allegedly suspicious calls took place, during the first few months of the litigation, there was almost no activity in the case. Therefore, the

Finally, the fact that Jones obtains information and is consulted in connection with compromise efforts on Note A does not undermine this finding, since he retains a fifty percent interest in the collected amounts. Jones's involvement in settlement negotiations does not suggest that he made a collusive or improper assignment to invoke federal jurisdiction.

Applying the Fifth Circuit's motive/function test, the Court remains unconvinced that Jones and GDQ (or Chambers) colluded or had an improper purpose to

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Court ascribes little weight to DX 46. The Court find [sic] on the basis of all evidence of record that DX 46 materially overstates the number of contacts between Rovell or Bright and Jones relating to Note A, and that the Court remains unpersuaded of the inferences Defendant seeks to draw.

Assuming that Defendant's Exhibit 46 is an accurate representation of the contacts between these parties, the Court finds that it does not necessarily indicate an improper assignment. Brass argues that the nature of contacts between Bright, Rovell, Jones, and GDQ indicates that Jones has retained substantial, if not total, control over this suit. For example, Brass emphasizes that Rovell had no contacts with GDQ for six months after this suit was initially filed. *See* Brass's Reply Brief, at 4. Jones, on the other hand, had substantial contacts with Rovell. *Id.* An examination of the docket sheet in this case, however, shows that nothing substantial occurred in the beginning months of this case. Thus, there would have been little reason for Rovell to contact GDQ. Second, as stated supra, the Court finds that Brass possessed most of the information relating to Note A. Thus, it is entirely reasonable to expect Rovell to have more contacts with Jones at the beginning of the suit.

invoke this Court's jurisdiction by assigning Note A to GDQ. Thus the bar of § 1359 is inapplicable.[12]

2. Validity of Partial Assignment Under Oklahoma Law

a. Choice of Law – Oklahoma Law Applies to This Issue

At the August 1999 hearing, Jones and Bright testified about the venues of events concerning the creation of Note A and its assignment of GDQ. The evidence is uncontroverted that Oklahoma has by far the most significant contacts to the disputes between the parties arising from Note A and related assignment. Note A has a choice of law clause providing that Oklahoma law shall govern its interpretation. At the time Jones and Brass negotiated their settlement with the FDIC giving rise to Note A, Brass resided in New York, Jones resided in Arkansas, Brass's attorney, William Mutryn, resided in Washington D.C., and Jones's attorney, Bright, resided in Oklahoma. Jones's settlement payment to the FDIC, which gave rise to Note A, was made in connection with the obligation of Brass, Jones and their affiliates to Penn Square Bank located in Oklahoma City, Oklahoma. Last, the oil wells,

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[12] The result would be the same even under the Ninth Circuit *Attorney's Trust* holding interpreting § 1359 and *Kramer*. Despite the fact that there was a "partial assignment" in the instant case, the assignment was a *bona fide* business transaction that had large financial, economic and personal importance wholly independent from any implications on federal jurisdiction. GDQ, the assignee, thus has a "substantial stake" (and risk) in the collection suit and in Note A.

the Nailon # 1 and Nailon # 2, that Brass contends are the basis of his fraud and contractual counterclaims, are both located in Oklahoma.

Defendant argues in passing that *both* Oklahoma and Texas law should apply to the assignment. Defendant, however, offers no explanation as to why Texas law should apply. As set forth above, there is a substantial nexus between Note A and Oklahoma, and the assignment agreement also is tied to these facts. The assignment does not have a choice of law clause, but its drafter, Bright, testified that he believed Oklahoma law would apply. Brass has offered no contrary evidence or argument in support of use of Texas law. Therefore, the Court applies Oklahoma law to determine the validity under state law of the partial assignment in issue.[13]

b. Oklahoma Law Analysis

The Oklahoma Commercial Code provides that "[i]f a transferor purports to transfer less than the entire instrument, . . . The transferee obtains no rights under this article and has only the rights of a partial assignee." OKLA. STAT. tit. 12A, § 3-203. The historical notes to this section state that "a partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee." *Id.* Under Oklahoma law, as interpreted by the Oklahoma Supreme Court, a partial assignee may bring suit to enforce a

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[13] For the Court's discussion on choice of law principles, *see infra* at 26-31. The Court also notes that the outcome would be the same under Texas law. *See infra* note 14.

partially assigned instrument. *See Finance Corporation v. Modern Materials Co.*, 312 P.2d 455, 458 (Okla. 1957). Thus, Oklahoma law recognizes a partial assignment and such a transaction is not *per se* invalid under Oklahoma law. Defendant Brass fails to cite any probative contrary Oklahoma law.

c. Champerty

Defendant also argues that the assignment of Note A was champertous and therefore invalid under Oklahoma law. Defendant contends that Jones's assignment should be voided and Plaintiff's federal complaint should be dismissed for lack of diversity jurisdiction.

The act of champerty is defined under Oklahoma law as the "officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441, 444 (Okla. 1981). In Oklahoma, the doctrine of champerty is extremely limited. *See id.; see also Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 325 (Okla. Ct. App. 1993). A charge of champerty will not prevail if the charged party has "any interest whatever in the subject matter of the suit. . . . " *See Mitchell*, 638 P.2d at 445.

The record establishes that the assignment of Note A was not champertous and that GDQ's prosecution of this suit is not improper on that ground. Jones and GDQ will each receive fifty percent of the collection proceeds, and GDQ must pay all litigation expenses as incurred. In addition, the assignment agreement placed all risk of collection on GDQ, which has already paid out-of-pocket

hundreds of thousands of dollars of legal expenses incurred to date. The risks of collection are enhanced by Brass's contentions that he is judgment-proof. Thus, GDQ has a genuine interest (*i.e.* potential "upside" and a sizable financial risk) in proceeding with this litigation. The Court holds that the assignment of Note A was not champertous.[14]

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[14] The result is the same under Texas law. Indeed, one of the cases Defendant cites in his champerty argument plainly states that "Texas courts recognize that causes of action are property rights which can be fully assigned." *Pineda v. PMI Mortgage Ins. Co.*, 843 S.W.2d 660, 675 (Tex. App. – Corpus Christi 1992, writ denied). Furthermore, the assignment of Note A is not commensurate with those types of assignments that Texas courts historically have found champertous. *See, e.g., State Farm and Casualty Co. v. Gandy*, 925 S.W.2d 696, 707 (Tex. 1996). In *State Farm*, the Texas Supreme Court reviewed four categories of assignments that they have held were invalid: (1) assignments of legal malpractice claims, (2) Mary Carter agreements, (3) assignments of a tort claim to one tortfeasor for the purpose of bringing a claim against another joint tortfeasor, and (4) assignment of interests in an estate. *Id.*, at 707-10. The Texas Supreme Court concluded that "[i]n widely different contexts we have invalidated assignment of choses in actions that tend to increase and distort litigation. *Id.*, at 711. Jones's assignment of Note A implicates none of the types of cases or concerns identified in *State Farm*. The assignment has in no way distorted or increased litigation. The central dispute has remained the same. A holder of a legally viable instrument is seeking to collect on the underlying debt. Therefore, the Court holds that the assignment of Note A is not champertous under Texas law.

B. Other Issues in Defendant Brass's Reconsideration Motion

In his Reconsideration Motion, Brass advances two other arguments. First, Brass argues that the effective date of his business divorce settlement with Jones was June 8, 1987, not January 14, 1987, as found by the Court in its Original Memorandum, and that the Court erred in rejecting Brass's "defensive claims" (on which Brass bases set-off contentions) when the Court held that the effective date of the well assignments was January 1987. Second, Brass argues that this court erred in applying Oklahoma statutes of limitations to this case because Texas choice of law principles dictate that the Court apply the applicable Texas limitations periods.

1. Effective Date of Brass-Jones "Business Divorce" Settlement

Brass argues in his Reconsideration Motion that the effective date of his business divorce settlement was June 8, 1987. Brass contends that June 8, 1987 is the relevant day for the Court's statute of limitations analysis on his fraud and breach of contract defensive claims and that his set-off claims therefore are timely. Brass argues further that therefore his defensive claims for fraud and contract (arising from Jones's assignment of the Nailon # 1 and Nailon # 2 wells) did not accrue until the parties' agreement embodied in an "Assignment of Oil and Gas Leases," dated January 14, 1987 (the "January 14 Oil and Gas Assignment") was released from this escrow account, *i.e.*, allegedly on June 8 1987. *See* Assignment of Oil and

Gas Lease, dated January 14, 1987, Exhibit 4 to Defendant's Response to Plaintiff's Motion for Summary Judgment [Doc. # 40]. To reach this result, Brass contends that all of the documents that he and Jones executed were held in a "global" escrow account that was created and governed by a single, all-encompassing "Closing Agreement." Brass contends that the parties agreed that these documents were to take legal effect on June 8, 1987, when the documents were released from escrow. He bases this contention on an affidavit from his counsel, William Mutryn, and documents allegedly attached thereto.

The Court rejects this argument on procedural and substantive grounds. Mutryn's affidavit is submitted too late and the contentions now asserted are waived under case law governing procedures applicable to motions filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Moreover, even if Mutryn's affidavit were considered timely, it is materially incomplete and his conclusory allegations remain unsupported by the record.

a. Rule 59(e) Motions Generally

The Fifth Circuit has implicitly created a waiver doctrine in the context of Rule 59(e), holding that a district court has wide discretion in determining whether to grant motions for reconsideration. *See Hale v. Townley*, 45 F.3d 914, 921 (5th Cir. 1995); *see also Abbott M.D. v. Equity Group Inc.*, 2 F.3d 613, 629 (5th Cir. 1993) (upholding district court's refusal to allow reconsideration when plaintiffs sought to assert entirely new legal theory); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (finding that movant's failure to raise a valid defense at a

"pragmatically sufficient time" justified denial of motion for reconsideration). Rule 59(e) motions are proper only if they either "establish a manifest error of law or fact" or "present new evidence." *Simon*, 891 F.2d at 1159. They cannot be used to argue a case under a new legal theory. *Id.* In terms of "new evidence," district courts are not required to accept evidence that was available to the parties during the pendency of their prior summary judgment motion. *See Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). In deciding whether to admit new evidence, district courts should consider: (1) the reasons for the failure to submit the evidence during the summary judgment proceedings, (2) the importance of the evidence to the moving party's case, (3) whether the evidence was available before the summary judgment order was issued, and (4) the likelihood that the non-moving party will suffer prejudice. *See Hale*, 45 F.3d at 921. Thus, a district court may find that a movant has waived his right to make certain arguments or present new evidence.

b. Analysis as to Effective Date of the Brass-Jones Business Divorce Settlement

The Court declines to entertain Brass's allegedly new evidence concerning a written "Closing Agreement." As noted above, Brass for the first time in re-argument seeks to proffer evidence through an affidavit of William J. Mutryn, Brass's counsel during the parties' "business divorce" negotiations in the 1980's. Brass requests that the Court consider Mutryn's documentary evidence and conclusory statements to establish the date the January

14, 1987 Settlement Agreement ("January 14 Agreement") and related assignments of Oklahoma oil and gas interests became effective.

Applying the Rule 59(e) factors to Brass's newly proffered evidence, the Court finds, first, that Brass has supplied absolutely no reason why he did not and could not have included this evidence in his original summary judgment pleadings (or his reply papers). Second, the importance of the document cannot be assessed, despite Brass's contentions, because the central document on which Brass (through Mutryn) now seeks to rely was not, and still has not been, supplied to the Court.[15] Brass was

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[15] Mutryn purports to base his conclusion on a "Closing Agreement" and letter dated June 8, 1987, he states were signed by counsel for the parties. Notably, however, Mutryn's Affidavit does ***not*** contain a copy of the closing Agreement. The only document appearing in the location where the so-called "Closing Agreement" is said to appear is an unsigned list bearing the date "12/22/86." The list appears to be some cross-reference or index of dozens of documents and paragraphs within the parties' numerous agreements. *See* Defendant's Reconsideration Motion, Exhibit A. Mutryn avers that "it was agreed that the Settlement documents would be held in escrow until all of the documents necessary for the Settlement were completed and executed, and those documents would not be effective until released from escrow." *Id.* ¶ 5. Mutryn does not specify when the alleged "Closing Agreement" was executed or what consideration was given by each party for it. While Mutryn purports to quote from that agreement (*see id.* ¶ 6), the absence of ***any*** copy, let alone a copy of a signed instrument, deprives the averments of probative value. While ordinarily a timely averment of counsel on the existence and meaning of a document might be sufficient to support denial of summary judgment, the Court reluctantly concludes that Mutryn's averment under all the circumstances presented here is

on notice of the statute of limitations issues, and responded to GDQ's contentions in his Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment [Doc. # 40]. Then, GDQ argued that the statute of limitations precluded Brass's contract and fraud claims in its own summary judgment pleadings. *See* Plaintiff's Reply Memorandum in Support of its Motion for Summary Judgment (*i.e.*, GDQ's Summary Judgment Response) [Doc. # 44]. Third, there is no claim by Brass that the evidence was not available before the Court's summary judgment opinion was issued. Indeed, the parties' respective summary judgment motions were pending for approximately three months, and the case had been on file since early 1997. Brass therefore was obligated to include in the summary judgment record pertinent information and documentation as to the timing of the transfers of the oil and gas interests that were the focus of Brass's arguments in this case. Brass did not do so in a timely fashion, and has failed to explain the omission (which continues in material part).

c. New Legal Arguments

Finally, Brass seeks to change its factual and legal arguments in its Reconsideration Motion as to the effective date of the Brass-Jones "business divorce" settlement. Brass belatedly argues that the timing of the transfer of oil and gas interests should be based on an interpretation of the alleged Closing Agreement. This

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insufficient to raise a genuine fact issue that the parties' settlement did not become effective until June, 1987.

argument, materially different from Brass's original positions, is untimely. Brass's belated contentions require GDQ (and the Court) to revisit many of all the issues previously addressed at length in the Original Memorandum. Thus, Brass's introduction of the new evidence at this stage cause GDQ, the non-moving party, unfair prejudice. The Court rejects Brass's efforts to supplement the record in this case. The Court exercises its discretion therefore to limit the record to those documents and substantive arguments submitted by the parties during the original summary judgment proceedings.

Even if the Court were to consider the late-filed Mutryn Affidavit, Brass has failed to present a signed agreement that creates any "escrow" of the type described by Mutryn. The single document in the Exhibits referenced in Mutryn's Affidavit is an unsigned list dated "12/26/86," not an agreement or contract. *See supra* note 15. There is no evidence in that document of specific agreements, promises or consideration by either party. Exhibit 2 is a letter dated June 8, 1987, that states in its entirety:

> This letter will serve to notify you that all of the Closing Documents entered into pursuant to the Settlement Agreement dated April 10, 1986, as amended, appear to have been fully executed by the necessary signatories to each. In accordance with the Closing Agreement dated January 14, 1987, and in accordance with your instructions, we hereby release such documents from escrow and *such documents are effective and binding pursuant to their respective terms and conditions.*

Mutryn Affidavit, Brass's Reconsideration Motion, Exhibit 2 (emphasis added). This letter thus contradicts Mutryn's conclusory assertion that the effective dates of the parties' various agreements was altered from the dates contained in those respective agreements.

It should be noted also that there are two "escrow agreements" in the original summary judgment record. *See* Special Escrow Agreement, dated June 4, 1987, Defendant's Response to Plaintiff's Motion for Summary Judgment [Doc. # 40], Exhibit 5; *see also* Agreement Concerning Special Escrow Account, dated June 4, 1987, *id.*, Exhibit 6. Neither of these agreements contain any reference to the January 14 Oil and Gas Assignment, nor any provisions deferring or altering the legal effect of previously executed settlement documents between the parties.

The Court also must exercise caution in crediting Mutryn's affidavit testimony at this stage. Mutryn offers parol evidence concerning an alleged agreement to postpone the effective date of the parties' written agreements and this parol evidence attempts to alter – and contradict – a key written agreement in the summary judgment record, the January 14 Oil and Gas Lease Assignment. *See* Exhibit 5 to Defendant's Response to Plaintiff's Motion for Summary Judgment; *see also* Compromise, Release and Settlement Agreement Between Jones and Brass, dated January 14, 1987, Exhibit 2 to Defendant's Response to Plaintiff's Motion for Summary Judgment.[16] *See*

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[16] Brass is incorrect when he contends that there is no evidence to support the Court's finding that the January 14 Oil

Mustang Tractor & Equipment Co. v. Liberty Mutual Ins. Co., 76 F.3d 89, 91 (5th Cir. 1996) (recognizing that parol evidence not admissible to alter the terms of unambiguous contract).

Finally, Mutryn's averments are materially inconsistent with his deposition in which he stated that Brass expected payment from the wells in issue, Nailon # 1 and Nailon # 2, "immediately" after the assignment of these wells on January 14, 1987. *See* Deposition of William Mutryn, Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment [Doc. # 44], Exhibit A, at 26, 28-29. In the original summary judgment proceedings, GDQ made the uncontradicted argument from this testimony that Brass had an interest in the wells immediately following the January 14 Assignment. *See* Plaintiff's Reply Memorandum, at 16.

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and Gas Assignment became effective on January 14, 1987. That Assignment expressly states that the assignment therein would become effective on January 14, 1987. In addition, the Compromise, Release, and Settlement Agreement is dated January 14, 1987. There is no language in that document that would indicate that the agreement would only be effective on a future date.

The Court notes that the record has always been somewhat confused and potentially incomplete. For instance, the parties refer in argument and in certain of their documents (such as the "Arkoma and Brass Compromise, Settlement and Release" ("Arkoma/Brass Agreement"), dated January 14, 1987 (*see, e.g.*, Defendant's Response to Plaintiff's Motion for Summary Judgment, Exhibit 3, at 2)) to an April 10, 1986 Settlement Agreement. This apparently was the parties' original settlement agreement but is not part of the record.

Therefore, this Court holds that even if Mutryn's affidavit were considered on the Reconsideration Motion, Brass has failed to raise a material fact question that the effective date of Jones's January 14 Assignment of Nailon # 1 and Nailon # 2 was postponed until June 1987, and thus the date Brass's defensive claims did not accrue until June 1987. The Court instead re-affirms its findings of fact and conclusions of law set out in its Original Memorandum and denies Brass's Reconsideration Motion on the issue of the effective date of the Brass-Jones settlement.

2. Applicable Statutes of Limitations

a. Brass's Statute of Limitations Contentions

In the initial summary judgment briefing, the parties made extensive argument, based on Oklahoma law, about whether Brass's fraud and breach of contract were time-barred. In the Original Memorandum, the Court held under Oklahoma law that these defensive claims each were untimely under applicable Oklahoma statutes of limitations.[17] Brass now inconsistently argues that the law of Texas, not Oklahoma, applies to the statute of limitations issues presented by its defensive claims. Brass first argues the unexceptional proposition that "[f]ederal courts sitting in diversity must apply the forum state's choice of law rules . . . so that actions are only barred by

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[17] The Court held first and foremost that Brass had not pleaded any claim for fraud under Rule 9(b) of the Federal Rules of Civil Procedure. Brass does not attack that conclusion in his Reconsideration Motion. *See* Original Memorandum, at 25-26.

limitations in federal court if they are barred in the forum state's courts." Reconsideration Motion, at 4 (citations omitted). Brass then argues that under Texas's choice of law rules, procedural matters are governed by Texas law, citing *Morris v. LTV Corp.*, 725 F.2d 1024, 1027 (5th Cir. 1984).

Brass secondarily argues that the "parties' choice of Oklahoma substantive law [in their agreements] does not control procedural questions in a Texas court." Reconsideration Motion, at 5-6, citing *Caton v. Leach Corp.*, 896 F.2d 939, 943 (5th Cir. 1990). Brass then reasserts his procedural/substantive distinction, contending that statutes of limitations are procedural and Texas, as the forum state, would apply its own limitations to his claims in this action. *Id.*

b. Analysis – Judicial Estoppel

The Court rejects Brass's arguments. First, the Court concludes that Brass is estopped from asserting the argument that the Texas statute of limitations applies to Plaintiff's claim. The Fifth Circuit has adopted the doctrine of judicial estoppel. *See Ergo Science, Inc. v. Martin*, 73 F.3d 595 (5th Cir. 1996). Judicial estoppel prevents a party from asserting a position in a legal proceeding that is "contrary to a position previously taken in the same or some earlier proceeding." *Id.* at 598.[18] Judicial estoppel

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[18] In *Martin*, the district court explicitly asked the parties if anyone had any interest in interpleaded funds that the Court intended to distribute to aggrieved investors. *Id.* at 596. After a claimant reported to the court that the claimant would not be

applies to the extent Brass now asserts arguments in his Reconsideration Motion materially different from the positions he previously asserted.

Brass originally argued that the Oklahoma statutes of limitations applied to this case and barred Plaintiff's suit. *See* Reply Memorandum in Support of Defendant Sanford P. Brass' Motion for Summary Judgment [Doc. # 42], at 3. At the time it issued its Original Memorandum, the Court had limited factual information on certain choice of law-related matters. Therefore, the Court relied upon Brass's representations that the Oklahoma statute of limitations applied to Plaintiff's claim. This reliance turned out to be well-founded. *See* Court's findings based on evidence from August 1999 hearing, *supra*, at 8.

The Court therefore rejects Brass's current attempt to argue that Texas's statutes of limitations apply. This argument is not factually or legally supported, and is nothing

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affected by distribution of the funds, the district judge issued a final judgment stating that none of the parties had an interest in the interpleaded fund. Two months later, the claimant filed a Rule 60(b) Motion seeking relief from the district court's actions, and the Court denied the motion. *Id.* Upholding the district court's actions, the Fifth Circuit adopted the doctrine of "judicial estoppel," which it defined as addressing "laudable policy goals . . . [by] preclud[ing] litigants from 'playing fast and loose' with the courts, and prohibit[ing] parties from deliberately changing positions based upon the exigencies of the moment." *Martin*, 73 F.3d at 598. The Fifth Circuit also noted that the district court in *Martin* had made representations to the *pro se* plaintiffs in reliance on the representations of the claimant, in addition to having entered final judgment. It is unclear from the Fifth circuit's opinion whether the funds had been disbursed or not.

more than an attempt to change his legal position in light of the Court's earlier holdings.[19] Therefore, the Court concludes that Brass is judicially estopped to argue that the Texas statute of limitations applies in this case.

c. Analysis – Choice of Law Principles

Even if the Court were to allow Brass the opportunity to re-argue the choice of law issue, the Court would still hold that Oklahoma law applies to the case under all available analyses.

A federal court sitting in diversity is to apply the choice of law rules of the forum state. *See Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975); *Caton v. Leach Corp.*, 896 F.2d 939, 942-43 (5th Cir. 1990); *Stuart v. Spademan*, 772 F.2d 1185, 1195 (5th Cir. 1985).[20] Accordingly,

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[19] Using the language of *Martin*, it appears that Brass is attempting to play "fast and loose" with this Court. *Martin*, 73 F.3d at 598.

[20] The starting point of any analysis is, of course, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held generally that when federal court jurisdiction is based upon diversity of citizenship, the court must apply the substantive law of the state in which it is sitting. *Erie*, of course, did not involve conflicts of laws issues. In the conflicts of laws analysis:

> there are really two substantive-procedural rules to be applied in a federal suit where jurisdiction rests upon diversity of citizenship and there is a conflict of laws problem.
>
> In the first of [sic] step of the two-step procedure, the federal court must decide whether the case, under the teachings of *Erie*, involves issues which are substantive. Substantive in this context means that

this Court must use Texas choice of law rules to decide which law governs the parties' disputes.

Parties' Own Choices of Law in Agreements. – Texas choice of law principles give effect to choice of law clauses if the law chosen by the parties has a reasonable relationship with the parties and the chosen state, and the law of the parties' chosen state is not contrary to a fundamental policy of the state. *See Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134, 1142 (5th Cir. 1992) (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414, 421 (Tex. 1984)); *Caton*, 896 F.2d at 942. Courts in Texas follow the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) in determining the proper law to apply in

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> the state law applicable to the issue or issues of the suit would significantly affect the outcome of the suit. If so, the federal court must apply the applicable state law on these issues, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464 [1470], 89 L.Ed. 2079 (1945), and will follow its own rules of procedure.

Morris, 725 F.2d 1024, at 1027 (quoting *Maryland Casualty Co. v. Williams*, 377 F.2d 389, 393 n.1 (5th Cir. 1967)). Brass attempts to draw a procedural/substantive distinction, harking to the *Erie* doctrine, for the proposition that statutes of limitations are procedural and thus the Texas statutes of limitations should be applied in this case. However, Brass's cited authorities are not dispositive. There is considerable authority holding that construing statutes of limitations are "substantive," not "procedural," in nature, since the outcome of the issue is pivotal in many cases. *See, e.g., West v. Conrail*, 481 U.S. 35, 39 n.4 (1978) (stating that state law should provide the applicable statute of limitations in diversity cases); *Hensgens v. Deere & Co.*, 869 F.2d 879, 880 (5th Cir. 1989).

contractual disputes. *See Minnesota Mining and Manufacturing Co. v. Nishika Ltd.*, 955 S.W.2d 853 (Tex. 1996); *Caton*, 896 F.2d at 943. Section 187(1) of the RESTATEMENT allows the parties to incorporate by reference in an agreement the laws of a forum to determine issues that could have been resolved by explicit agreement, such as "rules relating to construction" of an agreement. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1), Comment c (Supp. 1988); *see also* SCOLES & HAY, CONFLICT OF LAWS § 18.3, at 637 (1984) (choice of law for construing terms of contract is not restricted). Therefore, in *Caton v. Leach Corporation*, the Fifth Circuit gave effect to the parties' writing that their agreement be construed under California law. *Caton*, 896 F.2d at 942-43. The court of appeals similarly approved the application of California law to the plaintiff's claim for relief under an implied contractual covenant of good faith theory, which the Court held depended on the construction of the contract. *Id.*[21]

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[21] Brass cites two Fifth Circuit cases for the proposition that Texas courts should apply Texas procedural law even though the underlying contract contains a valid choice of law clause: *Morris v. LTV Corp.*, 725 F.2d 1024, 1027 (5th Cir. 1984), and *Caton v. Leach Corp.*, 896 F.2d 939, 943 (5th Cir. 1990). *Morris* is inapplicable to the present dispute in this respect because there was no contract clause in that case. The Fifth Circuit's procedural/substantive distinction applied to pure choice of law cases. In *Caton*, there were two distinct causes of action, one in contract and one in tort. *Caton*, 896 F.2d at 942. The parties' contract in that case stated that the agreement "was to be construed" according to California law. The Fifth Circuit held that the choice of law clause did not govern the tort claim in the case, and the court of appeals then applied Texas pure choice of law principles to the tort claim. *Id.* at 943.

The Court therefore must consider in the case at bar which contracts are in issue and the scope of their choice of law provisions. The summary judgment record establishes that parties intended that the May 1987 Settlement Agreement was to be their overarching agreement.[22]

That agreement contains a very broad choice of law provision, which provides in its entirety:

> *Choice of Governing Law.* The parties agree that the laws of the State of Oklahoma shall govern the *construction and enforcement* of this Amended and Restated Settlement Agreement, *together with any other written instruments executed by any of the parties* of this Amended and Restated Settlement Agreement with respect to the transaction contemplated hereby except as otherwise specified in the Agreements themselves.

Exhibit 1 to Defendant's Response to Plaintiff's Motion for Summary Judgment, at 28, § 17(h) (emphasis

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[22] The parties both argued the terms of that agreement in their summary judgment pleadings. A review of the documents reveals that the parties to the Jones/Brass January 14 Settlement Agreement (Exhibit 2 to Defendant's Response to Motion for Summary Judgment, at 2, 3 (referring to the April 1986 Agreement and Note A)) and the Arkoma/Brass Settlement Agreement, explicitly incorporated by reference in the terms of the parties' original April 10, 1986 Settlement Agreement. Later, the parties executed the May 1987 Settlement Agreement, and thereby rely on that contract as having superseded their April 1986 Agreement. Thus, to the extend the Arkoma/Brass Agreement and the January 14 Oil and Gas Assignment refer to the April 10, 1986 Settlement Agreement, those agreements now must be construed in light of the May 1987 Settlement Agreement. *See* Exhibits 3 and 4 to Defendant's Response to Plaintiff's Motion for Summary Judgment.

added).[23] The May 1987 Settlement Agreement thus provides that Oklahoma law applies to disputes concerning its own enforcement and that of related agreements. Among the related agreements are the Arkoma/Brass Agreement and the January 14 Oil and Gas Assignment, which Brass contends were breached and/or were the subject of Jones's fraud and thus give rise to certain offsets Brass claims against his obligations under Note A. Thus, by the parties' own agreement, Oklahoma law should be applied to the disputes at bar.

The Court therefore concludes that Brass's defensive claims for breach of contract and fraud are both governed by the parties' agreement to rely on Oklahoma law, and, by implication, that state's statutes of limitations. *See Tel-Phonic Services Inc.*, 975 F.2d at 1134 (holding that under Texas choice of law principles, a contractual choice of law clause also governs claims of misrepresentation that are related to the underlying contract).

"Pure" choice of Law Analysis. – Brass has a viable argument, however, that the pertinent contractual choice of law clauses do not govern the entirety of the parties' relationship, and thus do not govern Brass's fraud claim against Jones. The Court concludes that Oklahoma law nevertheless applies to that claim under the facts of this case.

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[23] The choice of law provision in Note A is more narrow. It provides:

> This Note A is to be construed according to the laws of the State of Oklahoma.

Defendant's Response to Plaintiff's Motion for Summary Judgment, Exhibit 7, at 4.

When parties have not agreed what state law will apply to a particular issue, Texas (the forum state) conflicts of law principles mandate that the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue. *See Minnesota Mining and Manufacturing Co.*, 955 S.W.2d at 856 (citing Restatement (Second) of Conflicts of Laws § 188(1) (1971)); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1413 (5th Cir. 1995) (quoting *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)). In determining which state has the most significant relationship, Texas courts consider

(1) the place of contracting

(2) the place of negotiation of the contract

(3) the place of performance

(4) the location of the subject matter of the contract, and

(5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

See Minnesota Mining and Manufacturing Co., 955 S.W.2d at 856 (citing Restatement (Second) of Conflicts of Laws § 188(2) (1971)).

Oklahoma has the most significant relationship to the issues in dispute, and Oklahoma's nexus to these issues is far greater than Texas's connection. The drafter of the various disputed agreements and other documents, Bright, lived in Oklahoma. At least one debt in issue under these agreements was due to Penn Square Bank, located in Oklahoma City, Oklahoma. The Penn Square Bank loan was made to Brass and Jones (or affiliates) in

connection with their development of two wells (Nailon # 1 and Nailon # 2) which are located in Oklahoma. *See generally* Defendant's Response to Plaintiff's Motion for Summary Judgment, Exhibit 4. The payment by Jones to the FDIC as receiver in Oklahoma for Penn Square Bank gave rise to the debt underlying Note A. Furthermore, there are no overriding public policy reasons why this Court should not apply Oklahoma law. The Court, therefore, concludes that Oklahoma law applies to the disputes at bar under all available analyses, and the Court was correct in applying Oklahoma Law in the Original Memorandum granting summary judgment. Brass's Reconsideration Motion, therefore, is denied on this ground as well.

III. CONCLUSION

Based on the reasons discussed above, the Court finds that the assignment by Jones to GDQ relating to Note A was not made with the intent to create federal diversity jurisdiction, and was not otherwise invalid. As a result, jurisdiction over this case exists. Brass has failed to demonstrate that the rulings in the Court's Original Memorandum were in error in any respect. The court therefore denies Brass's Reconsideration Motion, vacates its December 23, 1998 Order [Doc. # 57] and reinstates its November 2, 1998 Memorandum and Order [Doc. # 48]. It is therefore

ORDERED that the Court's December 23, 1998 Order [Doc. # 57] is **VACATED.** It is further

ORDERED that this Court's November 2, 1998 Memorandum and Order [Doc. # 48] is re-instated. It is further

ORDERED that Plaintiff's Motion for Summary Judgment [Doc. # 36] is **GRANTED and $5,023,381.80 is due and owing under Note A as of August 1, 1998.** It is further

ORDERED that Defendant's Motion for Summary Judgment [Doc. # 31] is **DENIED in large part, but is GRANTED** as to the scope of collateral subject to foreclosure in connection with Note A. It is further

ORDERED that the Second Claim of Plaintiff's Complaint [Doc. # 1] is **DISMISSED without prejudice.** It is further

ORDERED that Plaintiff is entitled to pre-judgment interest through **this date, August 31, 1999.** The Court will enter a Final Judgment containing the amount the parties have informed the Court is due, i.e., the amount due through August 1, 1998. If Plaintiff seeks to update that amount based on interest accrued under Note A since August 1, 1998, Plaintiff may submit within five (5) business days an amended final judgment containing the correct amount due.

SIGNED at Houston, Texas this 31st day of August, 1999.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GDQ CORPORATION,	§	
	§	
Petitioner,	§	CIVIL ACTION NO.
v.	§	H-97-1936
SANFORD P. BRASS,	§	
	§	
Respondent.	§	

FURTHER AMENDED SUPERSEDING FINAL JUDGMENT

(Filed Nov. 16, 1999)

For the reasons stated in this Court's Memorandum Opinion and Order dated October 31, 1998, and the Memorandum and Order dated August 31, 1999, it is

ORDERED, ADJUDGED and DECREED that judgment is **GRANTED** in favor of GDQ Corporation ("GDQ") on "Note A," dated June 6, 1986, signed by Defendant Sanford P. Brass and payable to Jerral W. Jones, the recourse amount from which was assigned to GDQ on May 6, 1997. GDQ is entitled to recover the sum of **$5,497,062.15**, reflecting the amount found due and owing under Note A as of August 1, 1998, plus interest accrued under Note A from August 1, 1998 through August 31, 1999. Plaintiff GDQ also is entitled to post-judgment interest at the rate of 5.224% per annum, which is $786.76 per day. It is further

ORDERED, ADJUDGED and DECREED that the collateral available to GDQ for foreclosure on Note A is

limited in accordance with the Memorandum Opinion dated October 31, 1998. It is further

ORDERED, ADJUDGED and DECREED that the Second Claim in GDQ's Complaint seeking an order of foreclosure is **DISMISSED without prejudice.** It is further

ORDERED that Plaintiff's Motion for Summary Judgment [Doc. # 36] is **GRANTED** in substantial part, in accordance with the Court's Memorandum Opinion and Order dated October 31, 1998, and the Memorandum and Order dated August 31, 1999. It is further

ORDERED that Defendant's Motion for Summary Judgment [Doc. # 32] is **DENIED in large part,** but is **GRANTED** as to the scope of collateral subject to foreclosure in connection with Note A. It is further

ORDERED that the Second Claim of Plaintiff's Complaint [Doc. # 1] is **DISMISSED without prejudice.** It is further

ORDERED that Defendant's Motion for Reconsideration is **DENIED.**

This is a **FINAL JUDGMENT.**

The Clerk will enter this Order and provide all parties with a true copy.

SIGNED at Houston, Texas, this 16th day of November, 1999.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20953

GDQ CORPORATION, An Arkansas Corporation

Plaintiff - Appellee

v.

SANFORD P BRASS, An Individual

Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Texas, Houston

(Filed Sep. 15, 2000)

ON PETITION FOR REHEARING EN BANC

(Opinion 8/11/00, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, and REYNALDO G. GARZA and PARKER, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing, is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge